Supreme Court, U.S.
FILED

94 311 AUG 1 8 1994

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER CORPORATION, Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER CORPORATION

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QUESTIONS PRESENTED

1. Under the circumstances of this case, did the Third Circuit correctly conclude that its decision in *International Association of Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), enforcing *John Deklewa & Sons, Inc.* (*Deklewa*), 282 NLRB 1375 (1987), cert. denied, 488 U.S. 889 (1988) (*Ironworkers*) should be applied retroactively, thereby nullifying the lawful repudiation of a pre-hire agreement before its normal termination date?

2. Did the Third Circuit correctly conclude that the retroactive application of *Deklewa* should be determined under the standard set forth in *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575 (1947) rather than under the *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971) standard as decided by the District Court?

3. Did the Third Circuit correctly apply the *Chenery* analysis to the circumstances of this case?

4. Did the Third Circuit err in referring the issues of contract breach and damages to arbitration despite the factual finding of the District Court that LIUNA ran a discriminatory hiring hall in violation of the Labor Management Relations Act, 29 U.S.C 141 *et seq.*?

PARTIES TO THE PROCEEDING

Petitioner, Foster Wheeler Corporation (FWC), is the parent of Foster Wheeler Energy Corporation (FWEC), a wholly owned subsidiary. Neither FWC nor FWEC has non-wholly owned subsidiaries.

Respondent, Laborers' International Union of North America, AFL-CIO (LIUNA) is a labor organization with whom FWEC was party to a prehire agreement entered into pursuant to the provisions of Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f). FWC and FWEC were appellees and cross-appellants below. LIUNA was the appellant and cross-appellee in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER CORPORATION

Foster Wheeler Corporation respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is titled "*Laborers' International*

Union of North America, AFL-CIO v. Foster Wheeler Corporation; Foster Wheeler Energy Corporation", Nos. 93-5208, 93-5233, 93-5244, (entered on May 20, 1994) and is not yet officially reported. Unofficial reports appear at 146 LRRM (BNA) 2391 and 128 Lab.Cas. p. 11,118 (Third Cir. 1994). App. 1a-72a.

The district court opinion from which the appeal was taken, *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corporation and Foster Wheeler Energy Corporation*, Civil Action No. 85-4240, is unreported. The Order of the district court embodying its opinion was issued on June 22, 1992. App. 228a-278a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 20, 1994. App. 1a-72a. A petition for rehearing and rehearing en banc was denied by the Court of Appeals on July 8, 1994. App. 287a-288a. On August 5, 1994, pursuant to motions filed by FWC and FWEC, the United States Court of Appeals for the Third Circuit stayed its mandate in this case until August 15, 1994. App. 289a. On August 10, 1994 and August 11, 1994, FWC and FWEC respectively filed motions to extend the stay of the court's mandate until August 22, 1994, which remained pending as of August 16, 1994. This petition for certiorari is timely filed within 90 days from the denial of the motions by FWC and FWEC for rehearing and rehearing en banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

§158(f) Agreements Covering Employees in the Building and Construction Industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives

such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

This action was initiated by a complaint filed in the United States District Court for the District of New Jersey by LIUNA under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185(a) (the Act) alleging a breach of a 1982 National Prehire Agreement between LIUNA and FWEC, entered into pursuant to Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f) (the Act). The Complaint alleged that FWC, the parent corporation, together with its unionized subsidiary, FWEC, and open shop subsidiary, Energy Plant Constructors (EPC), were alter egos and together constituted a single employer, bound by the terms of LIUNA's National Agreement with FWEC. EPC was not named as a defendant. The relief

sought was to compel FWC and FWEC to submit to arbitration the issue whether FWC and FWEC had violated the National Agreement by failing to apply its terms to EPC's so-called Mobil Oil Exploration & Production Southeast, Inc. (MOEPSI) project wherein EPC had contracted to construct a natural gas purification plant in Mobile, Alabama. App. 295a-303a.

FWC and FWEC moved for dismissal of the complaint on the ground that the District Court lacked subject matter jurisdiction. In the alternative, each sought summary judgment. LIUNA cross filed for summary judgment. On December 9, 1985, the District Court denied the motions of the two defendants and granted summary judgment in favor of LIUNA. *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corp., et al.*, 122 LRRM 2686 (D.N.J. 1985), App. 105a-133a, vacated and remanded 868 F.2d 573 (3d Cir. 1989). In so doing, it ordered that FWC and FWEC participate in an arbitration proceeding limited to the sole question of whether LIUNA's agreement with FWEC obligated EPC to hire LIUNA's members for work then being performed at the MOEPSI site, thus submitting the alter ego/single employer issue to the arbitrator. App. 120a-123a. Finally, though pressed to do so by the defendants, the court refused to decide the issue of contract repudiation under Section 8(f) of the Act, reserving that decision until the arbitrator had ruled upon the single

employer/alter ego issue and applicability of the contract to the MOEPSI project.[1] App.121a-122a.

FWC and FWEC moved for reconsideration on the ground that the court had exceeded its authority. The motions were denied on January 29, 1986. The court also denied FWC's motion for a stay of its orders and denied FWEC's motion for certification under 28 U.S.C. 1292(b). App. 166a-167a.

Following extensive discovery by LIUNA pursuant to the District Court's order, the case proceeded to arbitration. On November 10, 1986, the arbitrator issued his decision finding: (a) that FWEC was the alter ego of FWC; (b) that EPC was a single or joint employer with FWEC; (c) that FWEC and FWC, as alter egos, were parties to the National Agreement and obligated to apply that agreement to laborers' work on the MOEPSI project; and, acting beyond the scope of the submission, (d) that FWC and FWEC violated the National Agreement when they did not apply its terms to the laborers employed by EPC on the MOEPSI jobsite. App. 174a-175a.

Thereafter, FWC and FWEC moved to vacate the award. LIUNA moved to confirm. All parties moved for summary judgment. On November 17, 1987, the District

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[1]Ironically, had the court decided the issue of repudiation at that time (December, 1985), this case would have long been over as the NLRB had not yet issued its decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987) ("*Deklewa*"), which reversed years of precedent holding that a Section 8(f) contract could be repudiated during its term.

Court issued an order denying motions by FWC and FWEC to vacate the award and granting LIUNA's cross motion to confirm the award except to the extent that the award found a breach of the Section 8(f) National Agreement by FWC and FWEC. In addition, the District Court denied FWC and FWEC's motions for summary judgment and granted LIUNA's cross motion for summary judgment only to the extent consistent with the court's finding that FWC and FWEC repudiated the Section 8(f) National Agreement on June 6, 1985. App. 206a-207a.

An appeal (by LIUNA) and cross appeals (by FWC and FWEC) were taken from the court's decision. On February 22, 1989 the Third Circuit issued its decision holding that the district court erred in letting an arbitrator decide whether FWEC was an alter ego of FWC, and hence a party to the National Agreement, rather than deciding that issue itself. Therefore, the court vacated the district court's Order of December 5, 1985 compelling arbitration, and remanded this case to the district court for a determination of the alter ego question and whether FWC was bound by the National Agreement. *Laborers' International Union v. Foster Wheeler, et al.*, 868 F.2d 573 (3d Cir. 1989). All previous district court orders based on the assumption of alter ego status were vacated with permission given to the district court to reconsider them if it chose to do so in light of the court's decision in *Ironworkers* if it found that FWC and FWEC were alter egos. App. 220a-221a. LIUNA's request for reconsideration was denied on March 21, 1989. App. 226a-227a.

Beginning January 22, 1991, almost two years after the remand, the district court held a non-jury trial pursuant to the remand. In view of the court's earlier finding that repudiation occurred on June 6, 1985 and a stipulation by the parties that, based upon such repudiation date, damages were $18,500, FWC and FWEC did not contest, for the purposes of that proceeding, that they were alter egos. App. 232a.

On June 22, 1992 the district court issued its decision finding that *Deklewa* should not be applied retroactively to this case. However, it changed the date of repudiation from June 6, 1985 to August 9, 1985, thus greatly expanding the potential damages previously stipulated by the parties ($18,500). App. 278a. In the course of that proceeding and its decision the district court specifically found that LIUNA's affiliated Local was operating an illegal hiring hall under both the National Labor Relations Act, 29 U.S.C. §158(a)(3), (b)(2) and the Alabama Code, Section 25-7-30, by discriminatorily favoring union members over non-union members in referrals. App. 267a. The court requested the parties to attempt to reach agreement as to damages, stating that in the absence of agreement there would be a "judicial adjudication" of that issue. App. 278a, n.47.

On August 14, 1992, LIUNA filed a motion "for reconsideration and clarification", asking the court to reconsider its decision as to the non-retroactivity of *Deklewa*, and to refer the issue of the amount of damages back to the arbitrator (despite the fact that his award was vacated in its entirety in *Laborers v. Foster Wheeler*, 868 F.2d 573 (3d Cir. 1989)). On March 11, 1993, the district

court denied LIUNA's motion for reconsideration, but referred the issue of damages to arbitration rather than resolving that issue by "judicial adjudication" as stated in the court's June 22, 1992 decision. App. 281a-284a. FWC and FWEC attempted to seek reconsideration on the grounds that (a) the matter of damages should not be referred to arbitration, because there had never been a finding on the issue of breach; and (b) the issue of damages was moot because of the court's finding that LIUNA's affiliate was operating an illegal hiring hall. The court refused to permit the motion to be filed, stating that if the defendants wished to do so, FWC and FWEC could file a letter setting forth their reasons for wanting to file such a motion. FWC and FWEC did so. The court responded by letter dated March 23, 1993, again refusing to hear the motion but ruling that both the issues of breach and damages be arbitrated. App. 285a-287a.

In June of 1993, LIUNA filed an appeal from the Decision and Order of the district court. FWC and FWEC filed cross-appeals. This petition for a writ of certiorari is directed to the opinion of the Third Circuit on such appeals and cross-appeals. In that decision the Third Circuit held that the district court erred in not applying *Deklewa* retroactively. It also referred the issues of contract breach and damages to arbitration, despite its acceptance of the factual finding of the district court that LIUNA ran a discriminatory hiring hall in violation of the Labor-Management Relations Act, 29 U.S.C. 141, *et seq.* *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corporation, et al.*, ____ F.3d ____, 146 LRRM (BNA) 2391, 128 Lab.Cas. p. 11,118 (3d Cir. 1994); App. 71a. By reversing the district court's decision

on retroactivity, the Third Circuit transformed a case in which the parties had stipulated damages to be in the amount of $18,500, to one involving potential damages in the millions. It did so by nullifying repeated acts of repudiation of the National Agreement as it related to the MOEPSI project and applying *Deklewa* retroactively, thereby ushering in thousands of man hours of labor and the attendant interest on unpaid wages. It reaches this startling result by applying a 1987 NLRB decision (*Deklewa*) to events which occurred in 1985 when subsidiaries of FWC, relying upon years of NLRB precedent, lawfully repudiated the agreement with LIUNA. Moreover, the imposition of potential damages in the millions of dollars takes place in the context of an illegal hiring hall maintained by LIUNA and its Local 70.

The decision of the Third Circuit issued on May 20, 1994. A petition for rehearing and rehearing en banc was denied on July 8, 1994. On August 5, 1994, the Third Circuit granted motions by FWC and FWEC to stay its mandate. On August 10 and 11, 1994, FWC and FWEC, respectively, requested an extension of the stay, which remained pending as of August 16, 1994.

PRELIMINARY STATEMENT

The decision of the Third Circuit in this case charted new ground and places it in direct conflict with each of the circuit courts which have confronted the same issue on similar facts. It applies *Deklewa* retroactively to bar what would have otherwise been an effective repudiation of FWEC's prehire agreement with LIUNA.

John Deklewa & Sons, 282 NLRB 1375 (1987) (*Deklewa*), enforced sub nom. *International Association of Bridge, Structural & Ornamental Ironworkers, Local 3, v. NLRB*, 843 F.2d 770 (3d Cir. 1988) (*Ironworkers*). On facts similar to those presented by this case, the First, Fifth and Ninth Circuit Courts of Appeal have given effect to the employer's repudiation of an 8(f) agreement because at the time repudiation was permissible conduct under long-standing precedents of the National Labor Relations Board and the federal courts. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd. of Carpenters v. Mar-len of Louisiana*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[2]

In reaching its decision concerning the issue of retroactivity, the Third Circuit elected to apply the test formulated in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), rather than the *Chevron Oil Co. v. Huson* (404 U.S. 97 (1971)) standard applied by the district court. It justified that selection by noting that in *Ironworkers* the Third

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[2]See, also, *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D.Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. Vander Veen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989); *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

Circuit had applied neither *Chenery* nor *Chevron*, but had adopted the standard applied to NLRB decisions by the Second Circuit in *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2d Cir. 1983). App. 42a, n.13. Petitioners will assert in this petition that the Third Circuit erred in failing to apply *Chevron*, which focuses upon the reasonable expectations of that class of persons who would be adversely affected by retroactive application of a newly announced rule of law. Moreover, even if *Chenery*, which concentrates on the actual reliance of the affected party under the prior rule, were to be applied it was improperly applied in this case.

Having reversed the district court on the issue of retroactivity, the Third Circuit then went on to refer to arbitration the issues of contract breach and damages. In doing so, it accepted the finding of the district court that LIUNA's Mobile, Alabama local (Local 70) operated an illegal discriminatory hiring hall, conceding that LIUNA may therefore be entitled to no damages. App. 66a & n.29. Nevertheless, it went on to gratuitously suggest ways in which an arbitrator might avoid that conclusion, App. 67a-69a, even though the agreement itself specifically provided that the employer was required to comply with the local area referral and hiring procedures, only if such procedures met state and federal laws which Local 70's hiring hall, by judicial determination, did not do.

Accordingly, this petition for certiorari is filed to (a) resolve the conflict among the circuits, which exists with regard to the retroactivity of *Deklewa*, and (b) to preclude the submission of the issue of breach and damages to an arbitrator where it is obvious that because of

LIUNA's unlawful discriminatory hiring hall it is clearly not entitled to any damages.

ARGUMENT

POINT I

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THOSE CIRCUITS (THE FIRST, FIFTH AND NINTH) WHICH HAVE CONSIDERED THE RETROACTIVE APPLICATION OF *DEKLEWA*

Focusing on the *Chevron/Chenery Beam/Harper*[3] issue the Third Circuit makes only passing mention of the principal issue in this case; namely whether *Deklewa* should be applied retroactively where LIUNA (a) did not enjoy majority status; (b) could not achieve majority status; and (c) expressly disavowed any interest in representing the MOEPSI employees in an NLRB proceeding. App. 27a-33a, n.8. Thus, the Third Circuit stands alone as ***the only circuit*** which has applied *Deklewa* retroactively to achieve a result which would not have been possible under pre-*Deklewa* law as reflected in *R.J. Smith Construction Company, Inc.*, 191 NLRB 693 (1971) and its progeny.

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[3]*James B. Beam Distilling Company v. Georgia*, 111 S.Ct. 2439 (1991); *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993).

The First, Fifth and Ninth Circuits have refused to apply *Deklewa* retroactively. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd. of Carpenters v. Mar-len of Louisiana*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[4] One factor is dominant in each of these cases. ***In none had the union achieved majority status prior to repudiation***. In contrast to each of the cases, where *Deklewa* has been applied retroactively by a circuit court, the prehire (Section 8(f)) agreement had either been converted under the Board's merger doctrine to a Section 9(a) agreement or the union had otherwise achieved majority status. *International Association of Bridge, Structural and Ornamental Ironworkers v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *NLRB v. Bufco Corp.*, 899 F.2d 609 (7th Cir. 1990); *NLRB v. W. L. Miller Company*, 871 F.2d 745, 749-50 (8th Cir. 1989). Indeed, in *Ironworkers Local 3 (Deklewa)*, *supra*, the Third Circuit stated:

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[4]Five district courts (in addition to the district court below) have reached the same conclusion. *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D. Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. VanderVeen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989), *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

> The factors which would have established a multi-employer unit of employees as having obtained majority status plainly appear on the stipulated record submitted by the parties to the Board and which is before us now. Thus, even under the old *R. J. Smith* rule, it appears entirely likely that the Board would have held that *Deklewa* was not free to repudiate its agreement with the Union.

843 F.2d at 781.

Thus, the Third Circuit's decision in *Ironworkers Local 3* is consistent with the rationale of those circuits that have applied *Deklewa* retroactively. The decision in this case, however, establishes a new and radical approach never endorsed by the Third Circuit itself or by any other; i.e. ***Deklewa is to be applied retroactively even where LIUNA did not have and would not have achieved majority status and even where it has stated that it had no interest in representing the employees at MOEPSI.***[5]

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[5]In 1985 LIUNA filed unfair labor practice charges in three NLRB Regions in an attempt to enforce its agreement at MOEPSI, urging the same arguments as in this litigation. In each instance the charge was dismissed, in reliance on *R. & J. Smith Construction Co., Inc., supra*; *Ruttman Construction Company*, 191 NLRB 701; *Dee Cee Floor Covering Inc.*, 232 NLRB 421 (1977); and *Acme Marble and Granite Co., Inc.*, 271 NLRB 908 (1984); see *NLRB v. Ironworkers Local 103 (Higdon Construction Company)*, 434 U.S. 335 (1978). App. 73a-83a. Additionally, EPC, the subsidiary involved, filed a petition for a representation election in Region 15 of the NLRB, which includes Mobile, Alabama. LIUNA moved to dismiss the petition, as no question concerning representation existed because neither LIUNA nor

The Third Circuit also dismisses with only passing reference, and an erroneous view of *Ironworkers*, *supra*, the fact that this dispute is purely historical. Thus, the Third Circuit again has left itself alone in applying *Deklewa* retroactively in purely historical circumstances. See *United Bhd. of Carpenters & Joiners Local Union 953 v. Mar-len of Louisiana, Inc.*, *supra*; *Sheetmetal Workers Local Union No. 54 v. E. F. Etie Sheet Metal Co.*, 1 F.2d 1464, 1472 n.8 (5th Cir. 1993) (affirming *Mar-Len of Louisiana*, *supra*, cert. denied, 114 S.Ct. 1067 (1994); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, *supra*; *Camping Construction Company v District Council of Iron Workers*, 915 F.2d 1333, 1337 n.2 (9th Cir. 1990) (affirming *Mesa Verde Construction Co.*, *supra)*, cert. denied, 111 S.Ct. 1684 & 2260 (1991)); *Trustees of Michigan Laborers Health Care Fund v. M. M. Vander Veen Construction Co.*, 736 F.Supp. 138, 141-42, (W.D.Mich. 1989); *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731, 734-35 (D.MD. 1988); *Construction Industry Welfare Fund of Rockford, Ill. v. Jones*, 672 F.Supp. 291, 293-94 (N.D.Ill. 1987). Clearly, therefore, certiorari should be granted to resolve this conflict among the circuit courts of appeal.

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its Local claimed to represent a majority of EPC's field construction employees. App. 91a-92a.

POINT II

THE THIRD CIRCUIT ERRED IN NOT APPLYING THE *CHEVRON* TEST AND IN ERRONEOUSLY APPLYING *CHENERY* IN DETERMINING THE ISSUE OF RETROACTIVITY

In its consideration of the issue of retroactivity in *Ironworkers*, *supra*, the Third Circuit adopted the standard applied to NLRB decisions by the Second Circuit in *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2nd Cir. 1983). In doing so, it elected not to apply either a *Chevron* or *Chenery* analysis stating that under either of those tests it would have reached the same result. (See 843 F.2d at 780, n.12.) That result, however, as we have stated above, was motivated by the court's conclusion that even under the old *R. J. Smith* rule, it appeared that Deklewa was not free to repudiate its agreement with the Union. ***Such is not the case here.***

Chenery is not applicable to this case. *Chenery* dealt with the retroactive application by an administrative body of a new principle of law. Here, the Board's decision in *Deklewa* limited its retroactive effect to cases pending before that agency. In this case nothing was pending before the Board when it announced its *Deklewa* rule. Indeed as indicated above, unfair labor practice charges filed by LIUNA were dismissed by three separate Regional Directors. Further, this case arises from an attempt by LIUNA to enforce its contract in a *judicial* setting pursuant to Section 301 of the Act. 29 U.S.C. 185. Therefore, either the *Chevron* analysis or the "manifest injustice"

Semco standard applied in *Iron Workers*, *supra*, should have been applied in this case rather than *Chenery*.

The Third Circuit elected to apply *Chenery/Retail*[6] even though the three-prong test of *Chevron* clearly militates against retroactive application of *Deklewa* to the facts of this case. First, as we have indicated above, no circuit has applied *Deklewa* retroactively in cases where the union did not or would not have achieved majority status under the Board's former rule. The second *Chevron* factor also weighs in favor of defendants as this case has long been one of a purely historical nature, because the project is complete and EPC is no longer actively in business. Finally, it is well established that where in its application of the *Chevron* analysis, the court finds the first prong of the *Chevron* test to have been met, that is, the rule of law to be applied retroactively is *new* law, the court invariably finds that the third factor, the inequity of application, is also met.

> The third *Chevron* factor in practice overlaps with that of the first factor, in that it would be inequitable to give retrospective application to [a new law] that altered established law upon which plaintiff could have reasonably relied. Hence, a conclusion favoring prospective operation under the first factor appears to strongly advise a similar conclusion for the third factor.

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[6]*Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380 (D.C.Cir. 1972).

Gruber v. Price Waterhouse, 911 F.2d 960, 968 (3rd Cir. 1990) (citations omitted).

By concluding that the District Court erred in applying *Chevron* and adopting for the first time in the Third Circuit the *Retail* standard, which emphasizes *individual* reliance upon the old law, the court set the stage to ***penalize*** defendants who had clearly relied on pre-existing law through the retroactive application of *Deklewa*.

Nonetheless, if the Third Circuit was correct in applying *Chenery/Retail*, it reached an erroneous conclusion as to its application to the facts of this case. There can be no question of the defendants' reliance upon the existing state of the law when, on August 9, 1985, two years before the Board's decision in *Deklewa*, it wrote to the Union citing *Painters Local Union No. 64, Brotherhood of Painters v. Epley*, 764 F.2d 1509 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), ***expressly repudiating the FWEC agreement as to the MOEPSI project***. App. 264a-265a. Moreover, as early as June 3, 1985, the initial date of repudiation found by the district court, EPC's President, by letter to LIUNA, denied any contractual obligation toward LIUNA and in the alternative provided notice of the termination of any collective bargaining agreement it may have been a party to, whether by operation of law or otherwise. App. 196a-197a. Further, the so-called deception to which it alludes is belied by the fact that EPC was open and notorious in its intention to perform the

project on an open-shop basis.[7] All of these repeated acts of repudiation have now been effectively nullified by the Third Circuit's retroactive application of *Deklewa*. Clearly, therefore, the Third Circuit has not only selected an improper standard upon which to determine the question of retroactivity, but has erroneously applied that standard, and in so doing has changed a case involving no damages or perhaps $18,500 to one which could involve millions of dollars in damages and interest.

POINT III

THE THIRD CIRCUIT ERRED IN REFERRING THE ISSUES OF BREACH AND DAMAGES TO ARBITRATION

The opinion of the Third Circuit states:

> They [the defendants] are correct that discriminatory hiring halls are probably illegal, *e.g., NLRB v. International Brotherhood of Electrical Workers, Local 322*, 597 F.2d 1326, 1330 (10th Cir. 1979), that they apparently violate the agreement, *see* agreement Article V, § § 1-2, that the district court found the local hiring hall to

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[7]In their briefs to the Third Circuit, FWC and FWEC recited incidents dating as far back as March of 1984 from which it was evident that the union was fully aware, in part through direct conversations with FWEC management, that the project would not be performed by FWEC but rather by EPC, FWC's non-union affiliate.

> be run in a discriminatory fashion, *see* Mem. Op. at 18, n. 6, and, the local union having been under LIUNA's trusteeship since May, 1984, that LIUNA cannot distance itself from the illegal conduct. Thus, it may be true that LIUNA is entitled to no damages.[8]

App. 66a.

The Third Circuit then went on gratuitously to suggest that perhaps an arbitrator would find that the Union would have changed its procedures to bring the Local into compliance with the agreement and the law, or that the agreement forbade FWEC from repudiating the entire agreement until it provided LIUNA with a reasonable opportunity to cure, by bringing its hiring hall into compliance with the law and the terms of the agreement. App. 67a-69a.

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[8]Defendants did not argue that discriminatory hiring halls were *probably* illegal. It is clear that they are. Nor did defendants argue that the illegal hiring hall *apparently* violated the agreement. Defendants argued that it did violate the agreement and released the defendants from their obligation to utilize the hall. The clause, Article V, Hiring, Section 1, provides:

> The Employer agrees to comply with local area referral and hiring procedures contained in the local Laborers' agreement, *provided such procedures meet state and federal laws and are not inconsistent with the terms of this Agreement.*"

App. 304a (emphasis added).

But as the Third Circuit correctly stated, it is not its place to resolve or even to speculate on the solution to the questions posed. App. 68a. Therefore, one must wonder whether it was appropriate to pose such questions in the first place. However, no such options are available to the arbitrator. The clause in question does not say that the employer must afford the union an opportunity to cure an illegal hiring hall, nor does it speak of only allowing repudiation of the entire agreement in the event the illegality is not cured. Rather, it simply states that the employer has no obligation to use the hiring hall if it is illegal.[9] An arbitrator has no right to change a contract of the parties, which would clearly be the case if he followed either of the scenarios suggested by the Third Circuit. All potential damages would flow directly through the hiring hall itself for distribution to persons who were allegedly

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[9]In the 1950's, the NLRB dealt with the legality of hiring halls, particularly those extensively used in the construction industry. It sanctioned their use only when, in its operation, the Union met very specific guidelines. *Associated General Contractors, Mountain Pacific, Seattle & Tacoma Chapters*, 119 NLRB 883, 41 LRRM 1460 (1958), enf. denied 270 F.2d 425 (9th Cir. 1959); *Plumbers Union (Brown-Olds Plumbing & Heating Corp.)*, 115 NLRB 594, 37 LRRM 1360 (1956). The Board's efforts to penalize unions for operating illegal hiring halls required the return of dues and other damages. This prompted international unions to insert protective clauses such as that present in the instant case, which simply provided that the employer need not utilize a hiring hall if it did not conform with federal and state law -- as is the case here. These clauses were placed in contracts by International Unions for the protection of International Unions to insulate them from liability and to compel compliance with *Mountain Pacific* by their local unions. It is precisely the type of clause involved in this case, which the International now seeks to avoid.

denied referral to the MOEPSI project. If the referral list of Local 70 were used to ascertain the names of those individuals, clearly they would be profiting from the hall's illegality to the detriment of those who were denied access -- a result which should not be condoned. The issues of breach and damages, therefore, are clearly moot and should not have been referred to arbitration. Accordingly, this Court should grant certiorari as to this issue in order to preserve long-standing principles of labor law relating to the operation of hiring halls, and prevent LIUNA and its members from unjustly profiting from such illegality in the potential sum of several million dollars.

CONCLUSION

Based upon the foregoing and the record as a whole, the Court is urged to grant FWC's petition for writ of certiorari.

Respectfully submitted,

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AUGUST 1994

EDITOR'S NOTE:

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER CORPORATION, Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER CORPORATION

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Filed May 20, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5208, 93-5233, 93-5243

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

Appellant in No. 93-5208

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION,

Foster Wheeler Energy
Corporation
Appellant in No. 93-5233

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION,
Foster Wheeler Corporation
Appellant in No. 93-5243

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civ. No. 85-04240)

Argued: December 10, 1993

Before: BECKER and NYGAARD, *Circuit Judges,*
and YOHN, *District Judge.**
(Filed May 20, 1994)

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* Honorable William H. Yohn, Jr., United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal arises out of bitterly contested litigation over the applicability of a national "prehire" labor agreement to a worksite in Alabama. At ultimate issue is the defendant employers' failure to hire the employees engaged at the site from the plaintiff union's hiring hall. The parties have been ceaselessly embroiled in this matter for over eight years. During this time they have appeared before the district court thrice and an arbitrator once; they are now before this Court for the third time. Given what appears to us to be the relatively modest stakes and the fact that the primary point of contention in the case will probably never recur,[1] it is

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1. See Letter from John D. Burgoyne, Assistant General Counsel, National Labor Relations Board, to Stuart Rothman, Esq., Counsel to Foster Wheeler Energy Corp. (Aug. 4, 1993), in Reply Br. of FWEC, App. A.

unfortunate that their litigation strategies have prevented them from settling. We can only hope that the opinion that follows will edge them toward a swift resolution of their remaining disputes instead of propelling them back to the arbitrator for another round of pugnacious battle.

The principal question before us, one we will answer in the affirmative, is whether the district court erred in not applying retrospectively the National Labor Relation Board's decision in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), *enf'd sub nom. Iron Workers, Local 3 v.* NLRB, 843 F.2d 770 (3d Cir.) (per curiam), *cert. denied*, 488 U.S. 889, 109 S. Ct. 222 (1988). A host of questions is also before us, but many of them are rendered extraneous by our resolution of the retrospectivity question. As to those we need reach, we first conclude that the district court properly referred the issue of damages to the arbitrator, but should also have referred the question of breach as well. In addition, we will clarify the mandate we issued the last time the parties appeared before this Court -specifically, we will describe its effect on two factual findings which an arbitrator had made and the district court had adopted prior to the parties' second rendezvous here -and comment on the employers' contention that no damages may flow from their alleged breach of the prehire agreement because the union operated an illegal hiring hall in contravention of the prehire agreement as well as state and federal law.

In the end, we will instruct the district court to modify its Order of June 22, 1992, as modified on March 11, and 31, 1993, and to direct the parties to arbitrate the issue of breach of their pre-hire agreement in addition to the issue of damages, if any, flowing therefrom.

I. BACKGROUND

A. *Facts*

1. *The Parties*

Foster Wheeler Corporation ("FWC") is a major international construction firm with its principal place of business in Livingston, New Jersey. For a long time it was an exclusively union shop employer. It enters into its first National Agreement with the Laborers' International Union of North America, AFL-CIO ("LIUNA") in 1973, agreeing thereby, among other things, to recognize and acknowledge LIUNA as the exclusive bargaining representative for all field construction workers it would employ. LIUNA, in return, guaranteed that the terms of the agreement would govern irrespective of locale.

In 1974, in pursuit of a longterm expansion plan, FWC reorganized its commercial operations and became a holding company. Among FWC's motives for reorganizing was to become a double-breasted contractor, that is, to establish the capability to compete in both the open shop and the union shop markets. On November 11, 1974, FWC notified LIUNA that it had transferred its domestic engineering, manufacturing, and construction activities to

Foster Wheeler Energy Corporation ("FWEC"), a newly formed, wholly-owned subsidiary, and that it had correspondingly assigned to FWEC all labor agreements covering the affected employees. Since then FWC has neither performed field construction work nor entered into field construction labor agreements; instead FWEC (but not FWC) was listed as the employer in each subsequent National Agreement with LIUNA. FWEC itself was segmented into independently operated divisions, including Foster Wheeler World Services ("FWWS"), which performed all of FWEC's field construction work on a union basis, and Houston Engineering Center ("HEC"), which performed FWEC's engineering and procurement services.

Four years later, FWC furthered its 1974 reorganization plan and spawned Energy Plant Constructors, Inc. ("EPC"), a wholly-owned subsidiary which FWC formed and designed as the open shop counterpart to FWEC. To implement its open-shop policies, EPC hired its own employees and administered its own labor relations policies. EPC discontinued business operations in 1987.

LIUNA is the parent body of LIUNA Local 70 of Mobile, Alabama. The Local, in accordance with its constitution and bylaws, is affiliated with a regional building and trades council, Mobile Building Trades Council ("MBTC"). MBTC represents and acts on behalf of LIUNA Local 70 with regard to the negotiation and administration of labor agreements.

2. *The Agreement*

On April 20, 1982, FWEC and LIUNA entered into the National Agreement (the "Agreement") at issue here. The Agreement applied to all construction projects "performed by the Employer or by any person, firm or corporation owned or financially controlled by the Employer" within the political boundaries of the United States, except for those performed in one of three states (not including Alabama) already subject to a Tri-State Agreement.

On covered projects, the Agreement imposed several noteworthy requirements on FWEC: to hire employees through the referral systems of LIUNA's local affiliates; to recognize LIUNA as the exclusive bargaining agent for those employees; to adhere to certain requirements regarding wages, fringe benefits, and overtime; and to compel its subcontractors to comply with the substantive terms of the Agreement. The Agreement, however, expressly relieved FWEC of any obligation to recruit laborers through any local area hiring hall whose procedures violated state or federal laws or discriminated for or against laborers on the basis of their union membership.

3. *The Project*

At approximately the same time as FWEC was entering into its new agreement with LIUNA, Mobil Oil Exploration & Producing Southeast, Inc. ("MOEPSI") began the process of selecting a general contractor to oversee the engineering and construction of a sour gas treatment and sulfur recovery facility it wanted built at Bayou Jonas near

Mobile. The project consisted of an offshore platform and natural gas production facility, a pipeline to carry the gas onshore, and a sour gas treatment and sulfur recovery plant (the only portion of the project to which this case relates). Through a rather convoluted set of developments, MOEPSI eventually nominally awarded the construction contract for the gas processing plant to EPC in October 1984, with FWC guaranteeing EPC's performance and EPC nominally subletting the engineering work to HEC (a division of FWEC). This arrangement as depicted by the documents was suffused with subterfuge, however, for it is quite clear from the record, as both the district court and the arbitrator independently found, that in reality FWEC was the actual prime contractor on the MOEPSI project and EPC its subcontractor.[2]

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2. As the first step in its selection process, MOEPSI sent detailed questionnaires to 21 companies, including FWC. Since it no longer had any engineering or construction capabilities of its own, FWC referred the questionnaire to FWEC. Although neither FWEC nor FWC had ever engineered or constructed the precise type of facility MOEPSI specified, FWC forwarded the questionnaire to FWEC and not EPC, because only FWEC (which had worked on many more projects than had EPC) had the experience MOEPSI demanded.

During 1982 and 1983, MOEPSI twice reviewed and pared down the initial solicited applications, and on August 22, 1983 MOEPSI revealed a "short" list of five contractors which it asked to submit comprehensive bids. FWEC did not make the "short" list, but Ortloff Corporation ("Ortloff"), a Midland, Texas contractor with close ties to FWEC, did. Ortloff and FWEC had earlier reached an understanding that each would consider bringing the other one in on projects in the $10-$150 million range that it was awarded or was pursuing. That option appealed to Ortloff when FWEC suggested they jointly pursue the MOEPSI project because it did not wish to individually take on the risks

involved. The two agreed to cooperate on preparation of a joint bid, but MOEPSI conditioned consideration of a joint bid on a single entity taking overall responsibility for the project. As a result of Ortloff's equivocations, FWEC agreed to serve as the prime contractor for the project and Ortloff assumed responsibility for the construction work and certain specialized engineering services.

In the course of preparing its proposal for a joint bid with Ortloff, FWEC apparently determined that MOEPSI wanted to use non-union labor on the Bayou Jonas project, and therefore FWEC arranged with Ortloff to have Foster Wheeler Intercontinental Corporation ("FWIC") - an international subsidiary of FWC with no employees in the United States but subject to no union obligations - substitute as the prime contractor. The only practical effect of having FWIC rather than FWEC be the contacting party was that a non-union entity would *bid* on the construction work. There ensued a campaign of subterfuge directed at MOEPSI and LIUNA, only a portion of which we will recount here, which entailed FWEC holding out FWIC as the non-union bidder, whereas in fact only FWEC, a signatory to the Agreement, was working on the project.

On February 8, 1984, John Serappo, Vice President of FWEC, sent the joint bid to MOEPSI on FWIC letterhead, in which he proposed that FWEC's engineering and procurement services division, HEC, manage the project and engineer the utility and supporting facilities, and that Ortloff engineer the process units and construct all the facilities. MOEPSI promptly agreed, whereupon the staff of FWEC (rather than that of FWIC) began preparing the bid documents.

Shortly before the bid package was to be submitted, however, MOEPSI in a sudden about-face determined that Ortloff lacked the capacity to construct the project, placing FWEC under significant time constraints to find an acceptable replacement subcontractor. Following a quick review of three alternative open shop companies, including EPC, FWEC's open-shop sibling construction company, Serappo approved the

The local press widely publicized MOEPSI's award of the contract to EPC - as well as EPC's open-shop policy - during the fall and winter of 1984. LIUNA officials, suspicious of the goings-on, made numerous inquiries to the

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selection of EPC to supplant Ortloff in all its responsibilities except for those in connection with certain specialized engineering technologies. FWIC, in keeping with its disguised role as the prime contractor, submitted the bid package to MOEPSI on May 1, 1984, designating FWEC and EPC - the actual work engines - as its subcontractors. The bid was signed by W. Robert Campbell, who falsely identified himself as the area sales manager for FWEC whereas in fact FWEC employed him as an account sales engineer.

MOEPSI negotiated with the five qualified bidders and scrutinized their bid packages over the next five months. It eventually narrowed the candidate pool down to two, of which the FWIC/FWEC/EPC/Ortloff combined bid earned the highest marks. In the final days before the bid was to be awarded, however, MOEPSI's legal counsel determined that the prime contractor should have an Alabama general contractor's license. As FWIC - an *international* contractor - was not in possession of the requisite license, MOEPSI decided it could no longer serve as even the nominal prime contractor. To preserve the FWIC/FWEC/EPC/Ortloff bid package, MOEPSI assented to EPC, which did hold an Alabama general contractor's license, replacing FWIC as the prime contractor (FWC, of course, preferred substituting EPC instead of FWEC for FWIC so that it could continue its pretense about the prime contractor being open shop), but only under the qualification that FWC guarantee EPC's performance. FWC willingly executed the requested guarantee.

With this final obstacle overcome, MOEPSI awarded the contract to EPC during the last week of September, 1984. The contract was formally executed on October 1, 1984. In a separate contract, EPC nominally sublet the engineering work on the project to FWEC.

defendants concerning the application of the Agreement to the MOEPSI project. Apparently in each instance the defendants informally told the LIUNA officials that EPC was a non-union contractor not bound by the Agreement, and that, accordingly, the project would be completed by non-union labor. There is disputed evidence regarding whether FWEC affirmatively misrepresented to LIUNA its part in the project and its relationship to EPC.

As already mentioned, the Agreement required signatory employers to comply with the hiring provisions of local affiliates, but only if they were operated legally and did not discriminate against non-union laborers. MBTC, LIUNA's local affiliate, operated a hiring hall for construction workers, but, to LIUNA's chagrin, it discriminated against non-union members.[3] Seemingly unaware of MBTC's discrimination, EPC - itself not a signatory to the Agreement - opened its own hiring office for the MOEPSI project on January 29, 1985. Since the local press had widely publicized the available job opportunities, EPC received over 5,000 applications in the three days the

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3. Testimony at trial from the secretary-treasurer of MBTC, who was responsible for making referrals, casts substantial doubt on the equality of the hall's treatment of non-union members. The evidence led the district court to find that the procedures MBTC employed to fulfill work requests favored union over non-union workers, and hence to conclude that MBTC ran an illegal hiring hall. Because at the time LIUNA had placed the local into trusteeship, LIUNA was responsible for the discrimination. No evidence was proffered, however, showing that any of the defendants knew about this practice (or that LIUNA officials in fact knew about it) during the period the MOEPSI project underwent construction.

hiring office accepted them. EPC hired all the construction workers it employed on the MOEPSI project either through the applications that were submitted at the office or at the entrance to the job site. On April 2, 1985, the day EPC hired its first laborer for the project, the local union had over 200 union supporters on the local hiring hall's out-of-work list, although some unspecified number of them were busy working for non-union contractors.

4. *The Dispute*

On April 9, 1985, LIUNA sent out a formal grievance letter to the various entities related to FWC involved with the MOEPSI project - namely, FWC, FWIC, FWEC, and EPC - claiming that each of them was in violation of the Agreement as a result of its participation in the MOEPSI project (insofar as the laborers had not been hired out of LIUNA's affiliate's, MBTC's hiring hall). FWEC's counsel responded about one month later that FWEC would sometime in the future formally address the matters raised in LIUNA's letter, but that in the meanwhile he would meet informally with LIUNA representatives to discuss any difficulties clouding their relationship. Approximately one month after that, on June 3, 1985, EPC through its president also answered LIUNA's letter by denying any contractual obligation toward LIUNA and, in the alternative, providing notice of termination of any collective bargaining agreement it may have been a party to, whether by operation of law or otherwise. When several subsequent meetings between FWEC and LIUNA failed to resolve the matter, FWEC formally responded to LIUNA's

grievance in a letter dated July 11, 1985, reiterating its previous position and stating:

> Since the work in question is presently being undertaken by a company over which FWEC does not have and can exert no control, the LIU[NA]/FWEC National Agreement is not applicable. There is a different bargaining unit there with a different employer who, as we have very recently been given to understand, is proceeding pursuant to its agreement with the owner. FWEC employs no field construction laborers or mechanics at Mobile. There is nothing FWEC could do to make local labor agreements applicable.

Less than one month later, EPC filed a Petition for Election with the National Labor Relations Board ("NLRB" or "Board") or elect a union representative for all EPC's field construction employees at the MOEPSI project, or, more precisely, to dispel any doubts or reservations concerning whether the Agreement applied to the project at all by demonstrating LIUNA's lack of majority support amongst the workers. The Board failed to reach a decision on EPC's petition for several months and never completed the election.

In the meantime, FWEC formally modified its stance toward LIUNA: although it still maintained that the Agreement did not pertain to its activities on the MOEPSI project, on August 9, 1985 it expressly repudiated the Agreement to the extent that the Agreement was found to apply to the MOEPSI project. It identified *Painters Local*

Union No. 64 of Brotherhood of Painters v. Epley, 764 F.2d 1509 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S. Ct. 1636 (1986) as establishing its right to limit its repudiation of an area-wide prehire agreement to a single job site. The Eleventh Circuit Court of Appeals, the court exercising jurisdiction over the situs of the MOEPSI project, had handed down *Epley* a scant month earlier. At that time, of course, FWEC had already committed itself internally to using non-union labor, and, furthermore, had contractually bound itself to MOEPSI to use EPC as the non-union construction subcontractor (although, as structured on paper, EPC was the (nominal) prime contractor and FWEC the (nominal) subcontractor, *see supra* at 6-8 n.2).[4]

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4. About this time the parties became enmeshed in some collateral litigation before the Board, litigation which does not directly affect the outcome here but which helps set the stage. Coincidentally on the same day that FWEC notified LIUNA of its limited repudiation, LIUNA filed separate unfair labor practices actions against FWC, FWEC, and EPC for their failure to provide it with information it alleged § 8(a)(5) of the National Labor Relations Act ("NLRA"), 11 U.S.C.A. § 158(a)(5) (1973), gave it a right to. Each action was in turn dismissed by three different Regional Directors of the NLRB, principally on the ground that the Agreement was a prehire agreement pursuant to § 8(f), *id.* § 158(f), but that LIUNA had not demonstrated that it had achieved majority status at the work site as was necessary to convert the § 8(f) prehire agreement into a § 9(a), *see id.* § 159(a), collective bargaining agreement. That conversion was crucial to the charges LIUNA levelled against FWC, FWEC, and EPC, because only a collective bargaining agreement imposes on the employer the statutory duty to bargain with the employees' union representative and derivatively to supply that representative with information. The three regional decisions were joined for purposes of appeal and thereafter affirmed by the Board's General Counsel for substantially the reasons given by the Regional Directors.

By letter dated May 15, 1986, FWEC validly repudiated the entire (National) Agreement according to its terms effective July 15, 1986.

As the text above touched upon, EPC for its part on August 1, 1985, filed a petition in Region 15 of the NLRB (encompassing Mobile) to hold a representation election, in which EPC requested an election among all its field construction employees at the MOEPSI project. NLRB Petition 15-RM-387. LIUNA moved to dismiss the petition, asserting that the election was slated to poll all of EPC's field construction workers whereas it had disclaimed any interest in representing *all* those employees because traditionally it represented only some categories of workers at the site - the construction workers but not the skilled craftspersons and their associates. On November 18, 1985, over LIUNA's objection, the Regional Director issued a Decision and Direction of Election in response to EPC's petition. Among other conclusions, he resolved that 1) the Agreement constituted a prehire agreement under § 8(f); 2) the work unit could not be split into different sub-units for election purposes; 3) LIUNA had not demonstrated it had achieved majority status at the work site; and 4) EPC's filing of the Petition for Election would allow it to repudiate any prehire agreement which might have been in effect between EPC and LIUNA if the vote demonstrated that LIUNA lacked majority status among all the field construction workers at the work site. Based on these conclusions, the Director ordered an election involving all the field construction employees, and apparently one was held. LIUNA appealed from that decision, however, and when the appeal was granted the ballots were impounded. The Board remanded the matter to the Regional Director, but since another election was never held before FWEC and EPC completed the project, the Board on June 1, 1988 vacated its remand order and dismissed the petition as moot.

B. *Procedural History*

1. *Round 1*

On August 29, 1985, LIUNA filed this action on behalf of itself, its local, and its membership against FWEC and FWC under § 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.A. § 185(a) (1978). LIUNA sought to compel FWEC and FWC to submit to arbitration LIUNA's grievance concerning the applicability of the Agreement to the MOEPSI project. The Complaint alleged that FWEC, FWC, FWIC, and EPC were alter egos and/or a single employer and hence that all of them were bound by the Agreement. The Complaint further alleged that EPC, FWC, and FWIC each had breached the Agreement in connection with the MOEPSI project.

Upon considering defendants' alternative motions to dismiss, change venue, and stay the proceedings pending the outcome of the representation election scheduled at the MOEPSI site as well as plaintiff's motion for summary judgment, the district court on December 9, 1985 granted plaintiff's motion and ordered FWC and FWEC to submit LIUNA's grievance to arbitration. The court decided first that the Agreement as signed was a prehire agreement pursuant to § 8(f) of the National Labor Relations Act ("NLRA"), 29 U.S.C.A. § 158(f) (1973), not a collective bargaining agreement pursuant to § 9(a) of the NLRA, *see*

id. § 159(a).[5] Next, it resolved that since EPC's employees at MOEPSI had not yet elected a bargaining representative

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5. The distinguishing feature of a prehire agreement as compared to a collective bargaining agreement is that an employer and a union enter into it *before* the workers to be covered by the agreement and represented by the union have even been hired. The basic provisions of the NLRA forbid the employer from bargaining with a union which has not been "designated or selected by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C.A. § 159(a) (1978). Although other methods exist, designation or selection is best accomplished by the cumbersome and time-consuming instrument of election by secret ballot. *See Id.* § 159(c)(1) (providing for *certification* as the employees' representative). Prehire agreements developed in the fluctuant construction trade because the typically short duration and seasonal variation of employment in that industry make designating a union representative using the procedures developed for the more stable industries, such as manufacturing, unworkable.

Responding to the particularized needs of the construction industry and recognizing the practices prevailing prior to the Board's invalidation of prehire agreements (the Board disapproved of prehire agreements shortly after obtaining jurisdiction over the construction industry in 1947, *see* NLRB *v. Irvin*, 475 F.2d 1265, 1267 (3d Cir. 1973)), Congress engrafted § 8(f) onto the NLRA in 1959. That amendment allowed a union to act as the bargaining representative for employees before the Board certified it as enjoying majority status. *See Iron Workers, Local 3*, 843 F.2d at 772-74; S. Rep. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2344; I CHARLES J. MORRIS, THE DEVELOPING LABOR LAW, at 48, 714-15 (3d ed. Patrick Hardin ed. 1992). Once the union has attained majority status, the § 8(f) prehire agreement is converted into a § 9(a) collective bargaining agreement. *See NLRB v. Local Union No. 103, Int'l Ass'n of Iron Workers (Higdon Constr. Co.)*, 434 U.S. 335, 349-50, 98 S. Ct. 651, 660 (1978); *see also supra* at 11-12 n.4.

and since LIUNA did not even claim majority status at the MOEPSI site, the Agreement had not yet been converted into a collective bargaining agreement under § 9(a).

The court then ordered arbitration solely on the issue of whether the Agreement applied to the MOEPSI site *vel non*, reasoning that LIUNA had raised a colorable claim that EPC was FWEC's alter ego and that the question of the application of the Agreement to any specific project fell within the scope of the Agreement's capacious arbitration clause. The court reserved for itself, however, the questions of LIUNA's majority representation, the size and composition of the appropriate bargaining units, and defendants' alleged repudiation of the Agreement. We dismissed the defendants' appeal from the district court's arbitration order as interlocutory. *See Laborer's Int'l Union v. Foster Wheeler Corp., Nos. 86-5079, 86-5080 (3d Cir. May 1, 1986).*

2. *Round 2*

On November 10, 1986, after a lengthy hearing and extended briefing, Arbitrator Sam Kagel issued a decision in LIUNA's favor. The arbitrator found that FWEC and FWC were alter egos and that EPC was a joint or single employer with FWEC. Based on these findings, he concluded that EPC (through FWEC) was a party to the Agreement and consequently that both FWC and FWEC had breached the Agreement. He additionally determined that, contrary to the arrangements as they existed on paper, FWEC was the prime contractor and EPC the subcontractor at the MOEPSI site, and that the defendants had listed EPC as the prime contractor with the express intent to delude LIUNA.

3. *Round 3*

Just over a year later, the district court entered an order confirming the arbitrator's award insofar as he had found that the Agreement applied to MOEPSI project, but rejecting as an improper and unnecessary appendage beyond the scope of the reference that portion of the arbitrator's decision which found that FWC and FWEC had breached the Agreement. After rejecting numerous contentions raised by the defendants, the district court turned to the date of defendants' alleged repudiation of the Agreement. Because of *Deklewa's* supposed deviation from the decision reached by the Supreme Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S. Ct. 1753 (1983) (approving the pre-*Deklewa* rule), the district court held that *Deklewa* (discussed at length *infra* Part II) was invalid and refused to acquiesce in the rule it announced. This cleared the way for the court to find that

FWC and FWEC had effectively repudiated the Agreement on June 6, 1985, the date LIUNA had received EPC's June 3 letter repudiating any agreement which may have existed between them.

The court wrapped up its decision with the observation that only the issues of defendants' breach and liability for damages accruing before June 6, 1985 remained. The parties thereafter stipulated to $18,500 in damages so as to expedite their appeal to this Court.

4. *Round 4*

On February 22, 1989, this Court partially vacated the district court's order, holding that the district court had erroneously allowed the arbitrator to decide whether FWC was FWEC's alter ego. The district court's error in ordering arbitration of the alter ego issue lay in its failure to realize that the question of the duty to arbitrate is one for judicial resolution, and therefore that "it is the role of the district court, not the arbitrator, to pierce the corporate veil and require a parent corporation to participate in arbitration of a contract to which a subsidiary is formally a party." *Laborer's Int'l Union v. Foster Wheeler Corp.*, 868 F.2d 573, 576-77 (3d Cir. 1989) (per curiam).[6]

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6. *Cf. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. Union, Local 342 v. Valley Eng'rs*, 975 F.2d 611, 614-15 & n.7 (9th Cir. 1992) (holding that a district court must usually stay its proceedings if the Board is in the process of determining an employer's alter ego or single employer status).

Accordingly, we remanded for the district court to determine whether the two corporations were alter egos. In the process, we vacated all of the district court's orders subsequent to the one allowing discovery on the alter ego issue which were "predicated on the assumption that FWEC was FWC's alter ego," and instructed the district court that it "may reconsider the [vacated orders] in light of our recent decision in *International Ass'n of Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied, 488 U.S. 889, 109 S. Ct. 222 (1988)[, and enforcing Deklewa, supra]." Id.* at 577.

5. *Round 5*

After the district court's proceedings recommenced, FWC and FWEC conceded in open court on January 22, 1991 that FWC was FWEC's alter ego. After presiding over a two-day bench trial, the district court filed the opinion and order now under review on June 22, 1992.

The court first reaffirmed its prior ruling that the *Deklewa* rule did not apply, but, since *Iron Workers, Local 3* had approved of the *Deklewa* rule, did so on a revised basis. Specifically, it adjudged that it would be manifestly unjust to apply the rule retrospectively to these defendants, and concluded that this Court's decision in *Iron Workers, Local 3* did not dictate the automatic retrospective application of *Deklewa* but instead required a case-by-case evaluation of the justice of so doing. Mem. Op. at 27-29, 37-38. Analyzing the three *Chevron Oil* factors for guidance on whether or not to apply *Deklewa's* new rule of law retrospectively *see Chevron Oil Co. v. Huson*, 404 U.S. 97,

106-08, 92 S. Ct. 349, 355-56 (1971), the court concluded that its application of the rule would further the rule's underlying principles, but that the rule clearly departed from prior precedent and that its application would lead to an inequitable result. As part of its analysis of this issue, the court determine that LIUNA's unclean hands, due to the discriminatory referral practices of MBTC's hiring hall, equitably estopped it from arguing that FWEC and FWC (which had circumvented the Agreement's hiring procedures) were barred (by equitable estoppel) from justifying their repudiation of the Agreement by reason of LIUNA's lack of majority support at the MOEPSI work site.

Next, the court rescinded its earlier finding of a June 3, 1985 repudiation date, finding instead that the defendants had not repudiated the Agreement until three months later on August 9, 1985. It explained that FWEC's repudiation could not have occurred before June 3, 1985 because before then FWEC and EPC had simply claimed that the Agreement did not apply to the MOEPSI project. Moreover, due to its conclusion that the defendants' scheme involving FWIC was designed to deceive LIUNA regarding the applicability of the Agreement, the court withdraw from its earlier position and found that EPC's June 3, 1985 letter to LIUNA, in which ithad repudiated any agreement with LIUNA to which it may have been a party, did not suffice to repudiate the Agreement. It reasoned that EPC's June 3 repudiation did not extend to FWEC, despite the facts that FWEC and EPC were alter egos and that LIUNA had suspected that EPC was bound by the Agreement, because the defendants' calculated deception prevented LIUNA from being certain that EPC intended its repudiation to apply to FWEC as well. Finally,

the court concluded that FWEC's August 9, 1985 single-site repudiation was effective. Thus, the court held that FWEC would be liable for damages LIUNA sustained up to August 9, 1985.

Having disposed of the main issue of liability, the court ordered the parties to notify it within twenty days if they could settle on LIUNA's damages, or else to submit to it the issue of damages. Upon LIUNA's Motion for Reconsideration and Clarification, the court on March 11, 1993 modified its prior order and directed the parties to submit the issue of damages to arbitration. On March 31, the court denied defendants' application to file a Motion for Reconsideration of the court's March 11 Order. It is from the June 22, 1992 Order, as modified on March 11 and 31, 1993, that the parties appeal.

6. *Round 6*

This appeal followed. The district court had original jurisdiction to determine whether the defendants are obligated to arbitrate a grievance arising under a §1 8(f) prehire agreement pursuant to 29 U.S.C.A. § 185 (1978), *see Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 271-72, 103 S.Ct. 1753, 1759 (1983), and we have appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (1993).[7]

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7. Although the district court referred the question of damages to the arbitrator without designating its order as "final," we are satisfied that we have jurisdiction pursuant to § 1291. On March 31, 1993, the district court by letter denied defendants' second Motion for Reconsideration, explaining that "[t]he issue of whether there has been any *breach* of the

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agreement *and* what *damages* might flow from that shall, as provided in the National Agreement and as I ruled on March 15, *be resolved through arbitration*." Letter from Honorable Harold A. Ackerman, U.S. District Judge, to litigants in *Laborer's Int'l Union v. Foster Wheeler Corp.*, No. 85-4240 (D.N.J. Aug. 24, 1985) (Mar. 29, 1993) (emphasis added).

In its complaint, LIUNA had sought a variety of relief in addition to an order compelling arbitration. But it submitted in its letter defending this Court's jurisdiction that "[a]lthough the remedy portion of the complaint also sought the alternative relief of a money judgment from the court, the plaintiff has not pursued that remedy. Instead, the plaintiff has consistently maintained that the damages are an issue for the arbitrator. . . ." Letter from Theodore T. Green, Counsel for LIUNA, to P. Douglas Sisk, Clerk, U.S. Court of Appeals for the Third Circuit, at 2-3 (Apr. 29, 1993). The defendants have not disputed this assertion, see Letter from Francis A. Mastro, Counsel for FWC, to P. Douglas Sisk, Clerk, U.S. Court of Appeals for the Third Circuit, at 4 n.4 (April 30, 1993), and we have not found anything in the record to the contrary.

Thus, the order compelling arbitration is the "full relief" LIUNA seeks and no substantial issue remains outstanding for the district court to decide after the arbitration. Although the district court may still need to issue an order enforcing any arbitration award LIUNA may secure - a fact which obtains virtually whenever a court orders a recalcitrant party to arbitrate a dispute - the cases make clear that such a limited potential future undertaking does not torpedo an appeal prior to the arbitration. *See Zosky v. Boyer*, 856 F.2d 554, 558-60 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042, 109 S. Ct. 868 (1989) (discussing cases); *cf. Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550, 551-52, 77 S. Ct. 920, 921 (1957) ("A decree under § 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is . . . a 'final decision' within the meaning of 28 U.S.C. § 1291."). If any substantial issues remained for the district court to resolve after the arbitration, of course, there would have been no final order and we would lack jurisdiction, *See, e.g., Zosky*, 856 F.2d at 557-58; *Nationwide*

II. THE RETROSPECTIVITY OF DEKLEWA

In *Deklewa*, the Board abruptly reversed seventeen years of precedent established by R.J. Smith Construction Co., 191 N.L.R.B. 693, 695 & n.5 (1971), *enforcement denied sub nom. Local No. 150, International of Operating Engineers v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973) and *Ruttman Construction Co.*, 191 N.L.R.B. 701, 701 (1971) and held that construction industry prehire agreements negotiated under § 8(f) of the NLRA, 29 U.S.C. § 158(F), are no longer subject to unilateral repudiation by either the employer or the union. *See Deklewa*, 282 N.L.R.B. at 1377-78. The Board held instead that both parties must observe such contracts until "the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative." *See id.* at 1385. This represented a complete about-face: before that decision, under the reign of the *R.J. Smith* rule, the employer was free to repudiate a prehire agreement at any time unless the union obtained majority status. The union's attainment of majority status at any time subsequent to the parties' entering into the prehire agreement would "convert" the § 8(f) pre-hire into a § 9(a) collective bargaining agreement and thereby consummate a full bargaining relationship, regardless of whether the union had majority support at the time of repudiation. *See NLRB v. Local Union No. 103, Int'l Ass'n of Iron Workers (Higdon*

Ins. Co. v. Patterson, 953 F.2d 44, 45-46 (3d Cir. 1991); *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.* 819 F.2d 400, 403 (3d Cir. 1987).

Constr. Co.), 434 U.S. 335, 345, 349-50, 98 S. Ct. 651, 657-58, 660 (1978); *Deklewa*, 282 N.L.R.B. at 1378; *Ruttman Constr. Co.*, 191 N.L.R.B. at 702.

The controlling question presented by this appeal is whether this new rule (issued on February 20, 1987) - which turned the old rule on its head - should be retrospectively applied to conduct by the parties transpiring in mid-1985. The Board for its part determined to apply the rule retrospectively to all cases pending before it. See *Deklewa*, 282 N.L.R.B. at 1389. Nevertheless, the district court correctly determined that retrospectivity must be decided on a case-by-case basis: in affirming *Deklewa*, this Court applied the new rule retrospectively to the parties before it only after engaging in a case-sensitive review of the parties' circumstances. *See Iron Workers, Local* 3, 843 F.2d at 780.[8]

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8. LIUNA contends that the retrospectivity analysis at work here is affected by the decisions in *James B. Beam Distilling co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991) and *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1933), which worked a major substantive change in the federal law of retrospectivity. Both decisions ruled that the Constitution outlaws selective prospectivity of Supreme Court decisions, that is, the practice of applying a new rule of law promulgated by the Court to some but not all parties in pending cases. *See Harper*, 113 S.s Ct. at 2516 n.9, 2517-18; *James B. Beam*, 111 S. Ct. at 2447-48 (Souter, J., plurality opinion); *id.* at 2451 (Scalia, J., concurring); *cf. id.* at 2449 (White, J., concurring); *id.* at 2451-53 (O'Connor, J., dissenting); *see also id.* at 2451 (Scalia, J., concurring) (finding "both 'selective prospectivity' beyond [the Court's] power"). *James B. Beam* produced a fragmented decision of five opinions, with no opinion garnering more than three votes, so in our discussion we will focus on *Harper*, the majority opinion of which attracted five votes.

Although both opinions dealt with decisions issued by the Supreme Court, given the *ratio decidendi* of both cases, we suspect that other courts are probably correct that there is no cogent basis for distinguishing decisions handed down by the inferior federal courts. *See Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1128 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994); *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554 (Fed. Cir. 1993); *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 385 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 967 (1993); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir. 1992); *May v. Hobart Corp.*, 889 F. Supp. 309, 318 (E.D. Pa. 1993); *Hebert v. Manchester, N.H. Sch. Dist.*, 833 F. Supp. 80, 84 (D.N.H. 1993). *But see e.g. Gruber v. Price Waterhouse*, 911 F.2d 960, 965 (3d Cir. 1990) (pre-dating *Harper* and *Beam*) ("the determination of retroactivity *vel non* involves a balancing which must be done on a case by case basis"); *Gatto v. Meridian Medical Assocs., Inc.*, 882 F.2d 840, 842-43 (3d Cir. 1989)) (applying a case-by-case selective prospectivity analysis under *Chevron Oil*), *cert. denied*, 493 U.S. 1080, 110 S. Ct. 1136 (1990). However, we do believe that there are cogent grounds for distinguishing administrative agencies from federal courts, meaning that the Supreme Court likely would not extend the doctrine disapproving of "selective prospectivity" to agencies or Article I courts.

Both *Beam's* and *Harper's* rejection of selective prospectivity turned on principles of *stare decisis* and equal treatment of those appearing before the Court; those Justices who rejected pure prospectivity additionally invoked the Cases or Controversies Clause, *see* U.S. Const. ART. III, § 2, cl. 1. *Harper* placed heavy emphasis on *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), *overruling Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965), which "eliminated limits on retroactivity in the criminal context." *Harper*, 113 S. Ct. at 2516. *Griffith* reasoned that the

> Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that

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> this Court adjudicates only "cases" and "controversies." *See* U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases . . . . But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.
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> Second, selective application of new rules violates the principle of treating similarly situated defendants the same . . . . As we pointed out in *United States v. Johnson*, [457 U.S. 537, 102 S. Ct. 2579 (1982),] the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 457 U.S., at 556, n.16, 102 S. Ct., at 2590, n. 16 (emphasis in original).

Griffith, 479 U.S. at 322-23, 107 S. Ct. at 713; *see Beam*, 111 S. Ct. at 2444, 2446 (plurality) (Souter, J.) (raising the equality and *stare decisis* rationales); *id.* at 2450 (Blackmun, J., concurring) (stressing the equality rationale derived from the integrity of the judicial process and referring to the *stare decisis* rationale); *id.* at 2450-51 (Scalia, J., concurring) (referring to the *stare decisis* rationale).

These rationales do not apply analogously to administrative agency adjudications, *cf. Atlantic Richfield Co. v. United States Dep't of Energy*, 977 F.2d 611, 614 (Temp. Emer. Ct. App. 1992) ("Whether *Beam* has any *agency* adjudications is questionable."), *cert. denied*, 113 S. Ct. 1256 (1993); *District Lodge 64, Int'l Ass'n of Aerospace Workers v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) ("Whether *Beam* should apply to *agency* adjudications is unclear." (emphasis in original)); *United Food &*

Commercial Workers Int'l Union, Local No. 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993) (same), *cert, granted sub nom, Dubuque Packing Co. v. United Food & Commercial Workers, Local No. 150-A*, 62 U.S.L.W. 3657 (U.S. Apr. 4, 1994) (No. 93-1103), primarily because the doctrine of *stare decisis is* far less rigorous in that context, *see NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 110 S. Ct. 1542, 1549 (1990 ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy."); *NLRB v. Local 103, Int'l Ass'n of Iron Workers*, 434 U.S. 335, 351, 98 S. Ct. 651, 660-61 (1978) ("An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66, 95 S. Ct. 959, 967-68 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making."); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766, 89 S. Ct. 1426, 1429 (1969) (plurality) (referring to the "qualified role of *stare decisis* in the administrative process"); *NLRB v. Seven-Up Co.*, 344, 349 73 S. Ct. 287, 290 (1953) ("The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."); *Iron Workers, Local 3*, 843 F.2d at 776 ("As decisional law has made clear, it is not the function of the courts to interpret § 8(f), nor is any initial interpretation of one act made by the Board to be deemed 'frozen in concrete.'"); *see also Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) ("'Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.'" (quoting *Maislim Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S._, _, 110 S. Ct. 2759, 2768 (1990) (emphasis added)).

A second, fundamental difference between agencies and Article III courts is that an agency boasts both judicial and legislative powers. When an agency exercises its legislative powers, neither the "cases" or "controversies" prerequisite, nor the rule of *stare decisis*, rears its head. And, as *Chenery* illustrates, agencies are free to exercise their legislative powers in adjudications. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S. Ct. 1575, 1580 (1947) ("[A]ny rigid requirement [that the agency fill interstices in its organic statute through rulemaking] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order . . . . There is thus a very definite place for the case-by-case evolution of statutory standards."); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293, 94 S. Ct. 1757, 1771 (1974). Although arguably an agency endowed with rule-making powers may not announce purely prospective rules in adjudications, the restriction is not of constitutional origin. *See Wyman-Gordon Co.*, 394 U.S. at 761-64, 89 S. Ct. at 1427-29 (plurality of four) (stating that the Board cannot circumvent the rule-making procedural provisions of the NLRA with purely prospective adjudications); *id.* at 779, 89 S. Ct. at 1436 (Douglas, J., dissenting) ("I would hold the agencies governed by the rule making procedure strictly to its requirements . . . ."); *id.* at 781, 89 S. Ct. at 1437 (Harlan, J., dissenting) ("[T]he Labor Board has promulgated a rule in violation of the governing statute . . . .").

Finally, some agencies lack rulemaking powers, and requiring them to always apply each of their new rules retrospectively would effectively deny them the flexibility which is the cornerstone of administrative action and the *sine qua non* of administrative responsiveness. Especially as to them, a retrospective straight jacked would be counterproductive.

Thus, the consideration prompting the *Beam* and *Harper* decisions cannot simply be transposed to the administrative context. In recognition of these important distinguishing characteristics, courts insulated from the dynamic political pressures agencies face should jealously guard their protective power to watch over agencies, so that agencies' retrospective changes to the law do not brand conduct that was legal when performed illegal when challenged when to do so would cause "manifest injustice." *See* NLRB *v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) ("Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles . .. ."); *cf. Landgraf v.* USI *Film Prods.*, 62 U.S.L.W. 4255, 4262 (U.S. Apr. 26, 1994) ("[R]etroactive statutes raise particular concerns. The Legislature's . .. responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."). But agencies should retain their power to administer their organic statutes flexibly. Expansion of *Beam* and *Harper* to the administrative agency context is, in short, far from a foregone conclusion, and because we conclude that even under a choice-or-law analysis the *Dekelewa* rule applies retrospectively, we need not definitively decide this question.

We also do not think that the fact that this Court in *Iron Workers, Local* 3, applied the *Deklewa* rule retrospectively implies that *Beam* and *Harper* require this Court to apply it retrospectively again to this case. There exists a substantial distinction between *Beam* and *Harper* on the one hand and *Iron Workers, Local* 3 on the other, in that in *Iron Workers, Local* 3 this Court deferred to the Board's revised construction of its organic statute; it did not construe the statute for itself. *See Iron Workers, Local* 3, 843 F.2d at 776 (noting that while the Supreme Court had twice applied the pre-*Deklewa* rule, that rule was not *stare decisis* because the Court was merely reviewing the Board's interpretation and not announcing its own). Were a court's application of law as proclaimed by an agency binding in subsequent cases before that court, agencies would

Applying what the district court believed to be the proper test, it decided not to apply *Deklewa* retrospectively.[9]

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effectively labor under the same stringent *stare decisis* doctrine which binds courts, and this has never been the case. *See supra*. To the extent that here the agency was exercising its legislative powers, moreover, *Iron workers, Local* 3 construed the law as expounded by the agency to be that the new rule supplies lest manifest injustice would result. We do not doubt that legislative rules may within bounds incorporate come forms of selective prospectivity. *See, e.g.*, 28 U.S.C.A. § 2074(a)(Supp. 1993)(granting the Supreme Court the authority to fix the extent to which a newly promulgated rule of civil procedure or evidence shall apply to pending proceedings, but only "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule . . . would not . . . work injustice"); *cf. Bradley v. School Bd.*, 416 U.S. 696, 716-21, 94 S. Ct. 2006, 2019-21 (1974) (determining whether retrospective application of a newly enacted procedural statute in that case would breed manifest injustice).

9. The question whether in a particular instance the retrospective application by a district court of a rule of law announced in an agency adjudication will cause manifest injustice is a question of law, not one of equity, notwithstanding the fact that some "equitable" considerations may play a role in the outcome. *See In re Graham*, 973 F.2d 1089, 1093 (3d Cir. 1992) (holding that we exercise plenary review over the district court's retrospective application of a Supreme Court decision); *cf. Gruber v. Price Waterhouse*, 911 F.2d 960, 965 (3d Cir. 1990)(deciding *de novo* whether a decision by this Court applied retrospectively); *Gatto v. Meridian Medical Assocs., Inc.*, 882 F.2d 840, 842-44, (3d Cir. 1989) (same), *cert. denied*, 493 U.S. 1080, 110 S. Ct. 1136 (1990); *Hill v. Equitable Trust co.*, 851 F.2d 691, 696-99 (3d Cir. 1988) (same), *cert. denied*, 488 U.S. 1008, 109 S. Ct. 791 (1989); *see also Iron Workers, Local* 3, 843 F.2d at 780-81 (holding review of the *Board's* decision to apply a new rule of law retrospectively is deferential and that the Board's ruling will be disturbed only if it wreaks manifest injustice); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2516 n.9 (1993)(not

See Mem. Op. at 26-29. That court erred, however, when it departed from *Chenery's* "manifest injustice" analysis appropriate for *agency* adjudications and instead applied the three-prong *Chevron Oil* analysis once appropriate for *judicial* adjudications. *See Chevron Oil v. Huson*, 404 U.S. 97, 106-08, 92 S. Ct. 349, 355-56 (1971)(setting forth the test for retrospective application of new rules of law announced in "judicial decisions"). As we explained in *Iron Workers, Local* 3, while *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575 (1947) "has been applied exclusively to administrative agency adjudications," *Chevron Oil* "appears to have been applied exclusively to judicial adjudications." 843 F.2d at 780 n.12. Thus, to the extent that the *Chenery* inquiry differs from the *Chevron Oil* test, the district court committed legal error.[10]

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deciding whether *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971) was a "choice-of-law principle" or "a remedial principle for the exercise of equitable discretion"). A court of law is not blind to injustice. Hence although we pay deference to an *agency's* ruling on the retrospectivity of a rule it announces in an adjudication unless to do so would cause a manifest injustice, we apply plenary review to a *district court's* determination whether retrospective application of such a rule would indeed cause manifest injustice.

10. In *Iron Workers, Local* 3 we mentioned the equivalency of the *Chevron Oil* and *Chenery* analyses on the facts then before us. *See* 843 F.2d at 780 n.12 ("[O]n this record an independent analysis under either test would reach the same result here."). Given that the factors in *Chevron Oil* and *Chenery* vary in their emphasis, the same may not hold in all cases, and, in particular, it may be that the district court was correct when it decided that a *Chevron Oil* analysis would not countenance retrospective application of *Deklewa* to this case (although

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that is doubtful considering *Iron Workers, Local 3*).

The key discrepancy between the two inquiries is that, whereas *Chevron Oil* focuses on the *reasonable expectations* of the *class of persons* who will be adversely affected by retrospective application of the newly announced rule of law, *Chenery* concentrates on the *actual* reliance on the prior rule by the *particular* adversely affected *party* before the court. That means that the *Chevron Oil* analysis needs only be done once, in the decision first recognizing the new rule; by contrast, the *Chenery* analysis must be repeated in each case where the rule may be retrospectively applied.

This difference in application flows from the elemental dissimilarity between the two doctrines: *Chevron Oil* dealt with the question of *pure* prospectivity - *i.e.*, whether the rule should have future effect as to *all* parties, *see Chevron Oil*, 404 U.S. at 105-08, 92 S. Ct. at 355-56 (holding that the new rule of law "should not be applied retroactively in the present case"); *cf. Beam*, 111 S. Ct. at 2445 (plurality) (Souter, J.) ("selective prospectivity appears never to have been endorsed in the civil context"); *id.* at 2449 (White, J., concurring) - whereas *Chenery* dealt with the question of *selective* prospectivity - *i.e.*, roughly, whether a rule otherwise applied retrospectively should not apply retrospectively to the particular parties before the court, *see Chenery*, 332 U.S. at 202-03, 67 S. Ct. at 1580-81; *e.g.*, *Ryan Heating Co. v. NLRB*, 942 F.2d 1287, 1288-89 (8th Cir. 1991) (considering the adversely affected parties' *actual* reliance on the discarded rule); *Fox Painting Co. v. NLRB*, 919 F.2d 53, 56 (6th Cir. 1990)(same); *Ballbe v. INS*, 886 F.2d 306, 310 (11th Cir. 1989) (same), *cert. denied*, 495 U.S. 929, 110 S. Ct. 2166 (1990); *Ewing v. NLRB*, 861 F.2d 353, 362 (2d Cir. 1988) (same); *Southwestern Public Serv. Co. v. FERC*, 842 F.2d 1204, 1208-09 (10th Cir. 1988)(same); *Oil, Chem. & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1145 (9th Cir. 1988)(same); *NLRB v. Wayne Transp., Div. of Wayne Corp.*, 776 F.2d 745, 751 n.8 (7th Cir. 1985)(same); *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100, 1102 n.2 (4th Cir. 1985)(same),

The numerous other courts to have considered the retrospectivity of the *Deklewa* rule have divided over the issue, with the slight majority of the cases not applying it retrospectively; the roster is set forth in the margin.[11]

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cert. denied, 479 U.S. 984, 107 S. Ct. 573 (1986); *McDonald v. Watt*, 653 F.2d 1035, 1042-45 (5th Cir. Unit A Aug. 1981)(same); *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1063-65 (Temp. Emer. Ct. App. 1978)(same); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)(same).

11. *Compare NLRB v. Viola Indus.-Elevator Div.*, 979 F.2D 1384, 1396-97 (10th Cir. 1992)(applying *Deklewa* retrospectively)(using the "manifest injustice" standard and noting in passing that the union had achieved majority status prior to the employer's repudiation), *Iron Workers, Local 3*, 843 F.2d at 781 (same), *NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990)(using the "manifest injustice" standard and relying on the union's attainment of majority status to find no manifest injustice), *NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748-50 (8th Cir. 1989)(same, but due to the Board's incredible delay finding manifest injustice with respect to the interest the Board assessed), *appeal after remand*, 988 F.2d 834 (8th Cir. 1993)(denying enforcement), *R.W. Granger & Sons, Inc. v. Eastern Mass. Carpenters*, 688 F. Supp. 22, 28-30 (D. Mass. 1988)(using the "manifest injustice" standard but finding none as a general matter because of the uncertainty prevailing under the old rule) *and National Elevator Indus. Welfare Plan v. Villa Indus., Inc.*, 684 F. Supp. 1560, 1561, 1563 (D. Kan. 1987)(deferring to the Board's retrospectivity ruling without analysis although the union had failed to achieve majority status) *with C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-59 (1st Cir. 1990)(not applying *Deklewa* retrospectivity ruling without analysis although the union had failed to achieve majority status) *with C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-59 (1st Cir. 1990)(not applying *Deklewa* retrospectivity)(using the "manifest injustice" standard and finding manifest injustice because there was no evidence the union had achieved

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majority status, the dispute was purely historical, and application of the rule would disappoint reasonable private expectations and "penalize" the employer for having taken action lawful when taken), *Fox Painting Co. v. NLRB*, 919 F.2d 53, 56 (6th Cir. 1990)(using the "manifest injustice" standard and deferring to the Board's rule that it would not apply *Deklewa* retrospectively to cases where an appellate court had already affirmed a finding of liability before *Deklewa* was decided), *United Bhd. of Carpenters & Joiners Local Union 953 v. Mar-Len of La., Inc.*, 906 F.2d 200, 203-04 (5th Cir. 1990)(applying the *Chevron Oil* factors and finding that the employer relied on the old rule when entering into the prehire agreement and when repudiating it, that the work on the site had been completed, and that there was no evidence the union had obtained majority status), *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1472 n.8 (5th Cir. 1993) (affirming *Mar-Len of La., supra), cert. denied*, 114 S. Ct. 1067 (1994), *Mesa Verde Const. Co. v. Northern Cal. Dist. Council of Laborers*, 895 F.2d 516, 518-19 & n.1 (9th Cir. 1989)(using the "manifest injustice" standard and applying the *Chevron Oil* analysis, finding that the employer had relied on the old rule when it repudiated the prehire agreement, that the dispute was "strictly historical," that there was no way to determine if the union had enjoyed majority support, and that retrospective application would "penalize" the employer for taking action possibly legal when taken), *cert. denied*, 498 U.S. 877, 111 S. Ct. 209 (1990), *Camping Constr. Co. v. District Council of Iron workers*, 915 F.2d 1333, 1337 n.2 (9th Cir. 1990)(affirming *Mesa Verde Constr. Co., supra*), *cert. denied*, 111 S. Ct. 1684 *and* 2260 (1991), *Trustees for Mich. Laborers Health Care Fund v. M.M. Vander Veen Constr. Co.*, 736 F. Supp. 138, 141-42 (W.D. Mich. 1989)(applying the *Chevron Oil* factors, finding actual reliance by the employer on the old law, and without explanation disagreeing with the Board that retrospective application of *Deklewa* would promote the purposes of the NLRA), *Trustees of Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731, 734-35 (D. Md. 1988)(finding that the controversy was strictly historical, which means that, unlike in proceedings before the Board, the parties could not hold an election to test the union's majority

FWEC tries to distinguish the cases applying *Deklewa* retrospectively from these refusing to do so on the grounds that in all the former cases (i) the proceedings were pending in the Board at the time *Deklewa* was decided, and (ii) the employer effectively repudiated the agreement before *Deklewa* was decided. The district court tried to distinguish the cases on the basis of whether the union had clearly obtained majority status or not prior to the employer's repudiation of the prehire agreement. *See* Mem. Op. at 38. We think, however, that these attempts to reconcile the cases along the lines of one or another singular criterion must fail.

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status, and that applying the new rule would penalize the employer for taking action possibly legal when taken) *and Construction Indus. Welfare Fund of Rockford, Ill. v. Jones*, 672 F. Supp. 291, 293-94 (N.D. Ill. 1987)(using the "manifest injustice" standard and finding that the controversy was strictly historical, that the defendant actually relied on the old rule, and that application of the new rule would "effectively punish the [employer] for doing an act which was legally sanctioned at the time it was committed"). *But cf. Sheet Metal Workers, Local Union #312 v. Action Enters.*, 136 L.R.R.M. 2743, 2745 (D. Utah 1987)(relying on prior Tenth Circuit precedent adopting the *R.J. Smith* rule to reject *Deklewa* altogether).

Those courts applying *Deklewa* retrospectively in cases where the union had obtained majority status, especially where that factor was stressed, arguably did not truly apply the *Deklewa* rule retrospectively, as under the old *R.J. Smith* rule those courts would have reached the same result. Under the "conversion" doctrine of the *R.J. Smith* rule, once the union had obtained majority status, the pre-hire agreement became a collective bargaining agreement, and the employer was no longer free to repudiate the agreement at its pleasure.

First, not every court applies the same standard of review: some courts do not defer to the administrative agency's determination of retrospectivity at all, whereas this *Court in Iron Workers, Local 3* held that it would follow the Board's retrospectivity ruling absent a manifest injustice. *See NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 & n.2 (8th Cir. 1989)(noting the incongruity), *appeal after remand*, 988 F.2d 834 (8th Cir. 1993)(denying enforcement of the NLRB's order). *Compare, e.g., Iron Workers, Local 3*, 843 Fa.2d at 781 *and C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990) *with E.G., Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1472 n.8 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1067 (1994) *and Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 895 F.2d 516, 519 n.1 (9th Cir.), *cert. denied*, 498 U.S. 877, 111 S. Ct. 209 (1990). Moreover, the fact that some recurring circumstances have been identified as rendering retrospective application of the *Deklewa* rule manifestly unjust does not dictate a similar result in other cases presenting a dissimilar coincidence of circumstances. Finally, it appears that the courts are inconsistent and somewhat divided over the meaning and application of the "manifest injustice" doctrine.[12]

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12. FWEC also argues that the Board only intended retrospective application in cases pending before the agency, not those pending in federal courts. *See Construction Indus. Welfare Fund v. Jones*, 672 F. Supp. 291, 293 (N.D. Ill. 1987). In *Deklewa*, the Board was quoting from *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995, 1006-07 (1958) when it determined to apply the new rule overruling *R.J. Smith* "'to all pending cases in whatever stage.'" *Deklewa*, 282 N.L.R.B. at 1389. The Board, citing administrative efficiency, had decided in *Deluxe Metal*

Furniture that it would apply its new rule retrospectively "not only [to] the case in which such revisions are first announced and applied, but also [to] any other case which has not yet been decided, because it has not reached the Board's level or is at one of the other stages of the administrative process such as the hearing." *Id.*, 121 N.L.R.B. at 1006. The Board's reliance on *Deluxe Metal Furniture*, then, seems to indicate to FWEC that the Board meant the *Deklewa* rule to be applied retrospectively only to cases before the agency, not to those brought in the district courts under § 301 of the LMRA. *Cf. Trustees of Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731, 734-35 (D. Md. 1988) (suggesting that a rule different from that applied by the Board in unfair labor practice proceedings under § 8(f) might apply in § 301 proceedings); *Construction Indus. Welfare Fund of Rockford, Ill. v. Jones*, 672 F. Supp. 291, 293 (N.D. Ill. 1987) (intimating the same).

We hesitate to read too much into the Board's circumspect retrospective application of its new rule, however, because we think perhaps the Board was only being politic when it chose not to direct federal courts as to which rule of law to apply. In our view, the retrospectivity standard should be the same whether the proceeding was initiated in a district court or the agency. The whole concept of a uniform national law is thwarted if the parties can select the substance of federal law by the simple expedient of forum shopping. *Cf. Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2516-17 (1993) (stressing equality of treatment and stating that the "'substantive law [cannot] shift and spring' according to the particular equities of [individual parties'] claims'"); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-78, 58 S. Ct. 817, 820-22 (1938) (stressing equality of the law). The defendants' rule would raise the spectre, too, that this Court would eventually be placed in the compromising and awkward position of applying two irreconcilable rules of law to the same transaction between the same parties, one upon appeal from a district court and the other upon appeal from the Board.

As mentioned above, the decision controlling retrospective application of a rule of law an agency promulgates in an adjudication and providing the benchmark for the "manifest injustice" inquiry remains *Chenery*. *Chenery* stated as the general rule that the ill effects of retrospectivity

> must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive

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Furthermore, we do not wish thoughtlessly to set in motion a practice of interpreting statutes administered by dedicated agencies without affording the agency due deference simply because the initial forum was a federal district court rather than the agency. Not only would the practice unjustifiably undermine the effectiveness with which agencies may cultivate their organic statutes by adjudication instead of rulemaking, but the paramount rationales undergirding deference - agency expertise and congressional intent, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 104 S. Ct. 2778, 2782-83 (1984) - are by no means less pressing when the action is initiated in a federal district court instead of a federal agency. When a federal agency pronounces a rule of law subject to stage two *Chevron* deference, *see Chevron*, 467 U.S. at 842-44 & n.9, 104 S. Ct. at 2781-82 & n.9 (Congress may impliedly or expressly delegate "authority to the agency to elucidate a specific provision of the statute by regulation"), assuming the construction is a permissible one, the pronouncement essentially defines what the federal law *is*, not merely what the agency considers it to be for its own purposes. *See, e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-70, 100 S. Ct. 790, 796-99 (1980) (deferring to the construction of the Federal Truth in Lending Act by the Federal Reserve Board's staff in a case originally brought in a district court).

> application of a new standard, it is not the type of retroactivity which is condemned by law.

Chenery, 332 U.S. at 203, 67 S. Ct. at 1581. This Court has not had many opportunities to apply *Chenery*, however, and indeed the only case we have found decided by this Court that discusses *Chenery* in a helpful way is *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463 (3d Cir. 1981), *cert. denied*, 455 U.S. 939, 102 S. Ct. 1429 (1982).[13] There we referenced five factors announced by *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) to evaluate "whether the inequity of retroactive applications is counterbalanced by sufficiently significant statutory interests." *E.L. Wiegand Div.*, 650 F.2d at 471. Although the factors could be characterized as dicta insofar as this

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13. The reference to *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 892 (2d Cir. 1983) in *Iron Workers, Local 3, see* 843 F.2d at 780, was dicta and also, we think, not fully considered. *Semco Printing* relied on a line of cases considering retrospective legislative *lawmaking* or agency *rulemaking* of procedural rules, not retrospective agency *adjudication* of substantive rules. *See Bradley v. School Bd.*, 416 U.S. 696, 709-10, 94 S. Ct. 2006, 2015 (1974) (fee-shifting statute enacted by Congress); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 274-77, 89 S. Ct. 518, 522-23 (1969) (circular issued pursuant to agency's rulemaking powers); *Landgraf v. USI Film Prods.*, 62 U.S.L.W. 4255, 4264-66 (U.S. Apr. 26, 1994) (explaining that *Bradley* and *Thorpe* dealt with procedural rules and that legislation changing substantive rules has a different presumption regarding retrospectivity). We have no occasion to consider how retrospectivity differs between agency rulemaking and agency adjudication, if at all, but insofar as we have not ruled out the possibility that the standards may diverge somewhat, we think it prudent to draw on precedent dealing with adjudications.

Court never applied them in that case, they originate from the District of Columbia Circuit's landmark decision in *Retail, Wholesale* and appear to be in accord with other courts' interpretation of *Chenery, see supra* at 25-26 n.10, and thus we will adopt those five factors and apply them to this case.

The five factors we will consider are "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely occupies a void in an unsettled area of law, (3) the extent to which the party against whom the new holding is applied in fact relied on the former rule, (4) the degree of the burden imposed, and (5) the statutory interest in application of this new rule." *E.L. Wiegand Div.*, 650 F.2d at 471 n.5. We determine that the first and fourth factors favor neither party, that the third and fifth factors militate in favor of the Union, and that the second factor favors the defendants. After going through a balancing operation, we conclude that *Deklewa* applies retrospectively to this case.[14]

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14. In light of our resolution of the "manifest injustice" inquiry, we may disregard LIUNA's contention that FWEC and FWC are equitably estopped from complaining that retrospective application of *Deklewa* to this case would be manifestly unjust because of their deceptive conduct and their calculated failure to utilize MBTC's hiring hall. Br. of LIUNA at 25-29. We digress to observe, however, that it is far from clear that equitable principles apply to the "manifest injustice" choice-of-law inquiry. *See supra* at 24-25 n.9.

Three of these factors can quickly be disposed of. First, as we are not newly announcing the *Deklewa* rule in this case, the issue is not one of first impression. If it were, we would be compelled either to apply the new rule retrospectively or to reject it, as the prohibition against advisory opinions, *see Retail, Wholesale*, 466 F.2d at 390; *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966), assures that "[e]very case of first impression has a retroactive effect," *Chenery*, 332 U.S. at 203, 67 S. Ct. at 1581. Subsequent cases, on the other hand, do not always demand retrospective application of the "new" rule (we speak now only of agency adjudications). *See supra* at 20-24 n.8. Second, as all agree, the rule "represents an abrupt departure from well-established precedent." This fact cuts against retrospective operation, since the parties' reliance interests will more likely be disappointed. Third, the Board found, and this Court in *Iron Workers, Local 3* concurred, that there was a great statutory interest in the retrospective application of *Deklewa*, even in cases (like Deklewa itself)

where the dispute was purely of historical interest.[15] This factor accordingly weighs in on the side of retrospectivity.

As to the question of the substantiality of the burden, the record is unclear. The parties stipulated that if FWEC's breach of the Agreement dated only from April to June 1985, LIUNA's damages would come in under $20,000, almost a trifling sum in this context even when compared just to the costs and fees presumably expended in this 8-year litigation. If the period of the breach is extended to July 1986, the damages may not be disproportionately larger, although under some remedial theories advanced by LIUNA at oral argument, ones obviously different from those upon which the $20,000 calculation was premised, the damages

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15. We re not unaware of the fact that many courts have stressed that applying *Deklewa* retrospectively to a dispute of purely historical interest does not further the interests which the new rule was fashioned to advance, namely, labor stability and employee freedom of choice, *see Iron Workers, Local 3*, 843 F.2d at 780-81. *See United Bhd. of Carpenters & Joiners Local Union 953 v. Mar-Len of La., Inc.*, 906 F.2d 200, 203, 204 n.4 (5th Cir. 1990); *Mesa Verde Constr.*, 895 F.2d at 519; *Trustees for Mich. Laborers Health Care Fund v. M.M. Vander Veen Constr. Co.*, 736 F. Supp. 138, 142 (W.D. Mich. 1989); *Trustees of Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731, 735 (D. Md. 1988). But we have already held in a case which was only of historical interest that *Deklewa* applies retrospectively without being moved by that fact, *see Iron Workers, Local 3*, 843 F.2d at 772, 780-81; *Deklewa*, 282 N.L.R.B. at 1376, 1385 n.40, 1386, 1389, and under our Internal Operating procedure 9.1 we are not competent to retreat from the position even if we were inclined to do so.

might grow substantially.[16]Counterbalancing this fact is the defendants' great size and considerable wealth, as financial fortitude blunts the blow of damages. In sum, this inconclusive factor might favor either side.

Finally, as to the weighty factor of actual reliance by the adversely affected party, the record convincingly establishes that there was no actual reliance by the defendants on the superseded rule. While true that an abrupt about-face in the law (the second factor) "strongly advises" the conclusion of an "inequitable result" under the inapposite *Chevron* analysis, *Gruber v. Price Waterhouse*, 911 F.2d 960, 968 (3d Cir. 1990), this *Chenery* actual reliance factor spotlights the subjective question whether the party opposing retrospective application did, *in fact*, rely upon the retracted rule, rather than the objective question whether that party reasonably and justifiably could have relied upon it, *see supra* at 25-26 n.10; *see also infra* at 36-37 n.20.

The district court found that "the defendants tried to deceive the union about the applicability of the [Agreement] to the MOEPSI project for a long time," Mem. Op. at 37, which strongly suggests that the defendants themselves felt

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16. LIUNA orally argued that it might be entitled to recover the full amount of salary lost by (presumably identified) workers who desired employment at the MOEPSI project, regardless of mitigation of damages. The defendants rejoin that this position is preposterous. Neither party cites any authority on the point, but that is of little concern to us, as the fashioning of remedies for breach of a prehire agreement is, as we explain below at 49-50, suited especially for the experience and expertise of a labor arbitrator.

bound by the Agreement at that site.[17] In essence, they perpetrated the deception by pretending that the nominal contractor FWIC was the prime contractor on the project.[18] Furthermore, the district court found that "the defendants initially believed they could not repudiate the agreement for a single project and that they did not want to repudiate the agreement as a whole," seemingly because they wished to

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17. The court determined in this regard:

> [A]s part of their effort to support their claims that the National Agreement did not apply to EPC or the MOEPSI project, I find the defendants worked to conceal the ample evidence of FWEC's extensive involvement in the bidding process and in MOEPSI's project management. For instance, during the bidding process, FWEC officials and employees used FWIC's letterhead to communicate with [MOEPSI]. Similarly, although FWEC employees actually prepared the bid and Mr. Sarappo suggested conducting the project management from FWEC's headquarters at the Houston Engineering Center, FWIC and later EPC were technically designated as MOEPSI's project managers. These actions and the others detailed in the findings of fact convince this court that the defendants not only failed to repudiate the National Agreement prior to June 3, 1985 but that they actively deceived LIUNA regarding its applicability.
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> Mem. Op. at 44.

18. FWEC attempts to deride the district court's finding of deception by focusing on the fact that EPC was openly and notoriously non-union. *See* Br. of FWEC at 29-31. But the trial court's finding was predicated on FWEC's surreptitious use of FWIC as a surrogate contractor and its subsequent misidentification of EPC as the prime contractor rather than as the subcontractor, not on any action taken by EPC to conceal the fact that it ran an open shop.

reap the rewards of the Agreement in other regions of the country where union influence was stronger. Mem. Op. at 32.

The defendants' initial belief was justified until they learned about *Painters Local Union No. 64 of Brotherhood of Painters v. Epley*, 764 F.2d 1509 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S. Ct. 1636 (1986), in which the Eleventh Circuit held that an employer could repudiate an area-wide prehire agreement with respect to a particular job site without affecting the agreement at other job sites. Undoubtedly the defendants' early belief that they could not selectively repudiate the Agreement with regard to a particular site accounts for the deception noted above. But *Epley* was handed down on July 12, 1985 (the district court found that FWEC explicitly repudiated the Agreement as to the MOEPSI site alone on August 9, 1985), months after the defendants had fully committed themselves, both internally and contractually, to use non-union labor, and saddled themselves with that obligation by opening their own hiring hall (in January 1985) and hiring their workers from there (commencing on April 2, 1985) instead of from MBTC's hiring hall. *See supra* at 9.

Given this state of affairs, we do not see how, measured from the moment the defendants reached their decision to "repudiate" the Agreement (which we think happened at the time FWEC decided to use FWIC as the nominal contractor, sometime before February 1984, *see supra* at 6-8 n.2), they possibly could have relied on their as of yet unestablished right to repudiate the Agreement

selectively with respect to a single job site.[19] Rather, it is abundantly clear from the measures they undertook to conceal FWEC's involvement in the project that they in fact believed they had no such right. In short, we are persuaded that had *Deklewa* been decided and entrenched long before the defendants ever heard of the MOEPSI project, neither FWEC nor FWC would have behaved any differently. At all events, in February 1984 - the date, as noted above, when the defendants chose to bypass the Agreement at the MOEPSI site - the defendants could not have been very confident that LIUNA would not enjoy majority support at the MOEPSI site. *See supra* at 13 n.5 (discussing the implications of a union obtaining majority status).

We turn now to the balancing exercise. We bear in mind the backdrop that "when the Board changes a rule and makes it retroactive, particularly when the Board assigns as its reasons for doing so the furtherance of the fundamental statutory policies of employee free choice and labor relations stability, the Board should be entitled to exercise its broadest power." *Iron Workers, Local 3*, 843 F.2d at 780. We are also reminded of the truism that in the context of adjudication, retrospectivity is, and has since the birth of this nation been, the norm. *See, e.g., Harper v. Virginia Dep't*

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19. Even in its brief before this Court, neither FWEC nor FWC cites a case predating *Epley* which approved of a single-site repudiation, and our own research has shown *Epley* to be a ground-breaking case. *See, e.g., New Mex. Dist. Council of Carpenters & Joiners v. Jordan & Nobles Constr. Co.*, 802 F.2d 1253, 1255-56 (10th Cir. 1986); *Trustees for Mich. Laborers Health Care Fund v. M.M. Vander Veen Constr. Co.*, 736 F. Supp. 138, 143-44 (W.D. Mich. 1989).

of Taxation, 113 S. Ct. 2510, 2516 (1993); *cf. Hill v. Equitable Trust Co.*, 851 F.2d 691, 695-96 (3d Cir. 1988) (discussing the competing views on retrospectivity), *cert. denied*, 488 U.S. 1008, 109 S. Ct. 791 (1989).

Although retrospectivity is not mandated, as this case is not one of first impression, the sole factor opposing retrospectivity is the fact that the rule signalled an abrupt departure from prior precedent. But this factor itself was considered in *Deklewa* and, on appeal, in *Iron Workers, Local 3*, and neither tribunal found it defeated retrospective application of the *Deklewa* rule then.[20] Indeed, defendants

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20. The Board in *Deklewa* abstractly addressed the reliance interest in the old rule as follows:

> Some employers probably have relied on *R.J. Smith* as a means of repudiating a prehire agreement. However, that reliance interest is not a particularly strong one in light of the purposes that congress sought to achieve under Sec. 8(f). The interest that is entitled to protection is the ability of an employer to avail itself of the Board processes to determine whether there is continued majority support to undergird the union and the agreement. The new rule, which affirms the Board's election procedures for resolving that issue, does not seriously detract from what an employer should appropriately expect in the way of protection under the old rule.

282 N.L.R.B. at 1389 n.61. The Board is correct that generally an employer could not reasonably rely on a right of repudiation that was contingent on the union not acquiring majority status, but there may be an exception if the employer was realistically confident that the union would not obtain majority status. For this reason we have focused on the particular evidence of lack of reliance in this case.

have not in fact relied to their detriment upon the discarded rule, a factor of primary importance. Moreover, we held in *Iron Workers, Local 3* that the statutory interest in application of the new rule is substantial. Finally, the burden the defendants might bear does not look to be disproportionately large given their means. In view of the foregoing, we conclude that the factors strongly weigh in favor of retrospective application of the *Deklewa* rule to this case.[21]

It may well be true that the repudiator's reliance interest is less compelling when the case is still pending before the Board, since then the Board could perhaps conduct an election "to test the union's majority status." *Trustees of Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731, 735 (D. Md. 1988). But the board has applied *Deklewa* retrospectively, found the employer guilty of an unfair labor practice, and ordered appropriate remedies without first holding an election. *See, e.g., MIS, Inc.*, 289 N.L.R.B. No. 62 (1988) (ordering an employer to make its employees whole but not scheduling an election). Moreover, contrasting the sluggish rate at which the board's bureaucratic wheels sometimes rotate with the rapid turnaround prevalent in the construction industry convinces us that even in cases pending before the Board an election will quite often be impracticable. For example, in this case the Board had to dismiss a petition for election when the sizable MOEPSI project terminated before the election could be held. In an event, we agreed with the Board in *Iron Workers, Local 3, see* 843 F.2d at 781, so the issue is water over the dam.

21. Because of this disposition we are not called upon to reach the question whether the defendants were precluded from repudiating the Agreement at their pleasure for purposes of an action under § 301 notwithstanding the fact that under the *R.J. Smith* rule it would not have been an unfair labor practice for them to do so. That is to say, merely

The consequence of our conclusion that *Deklewa* applies retrospectively is that the Agreement at the MOEPSI site was never repudiated by the defendants until they rightfully terminated it effective July 15, 1986. Under *Deklewa*, an employer cannot repudiate a prehire agreement unless the Board first conducts an election decertifying the union. *See* 282 N.L.R.B. at 1385. The facts indicate that no effective election was ever held (the NLRB did conduct an election, but on appeal from the election petition the ballots were impounded and by the time the board remanded the

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because repudiation would not have been an *unfair labor practice* under *R.J. Smith* would by no means have been conclusive as to whether or not the repudiator would have *breached* the pre-hire agreement and the other party would be entitled to damages. The parties have approached and argued this case as if the issue of whether the Board would consider repudiation an unfair labor practice were dispositive of whether there was a breach of the § 8(f) prehire agreement, and consequently whether the other party could recoup damages for said breach. Such assumption was unwise, *See, e.g., Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 267, 103 S. Ct. 1753, 1757 (1980) (differentiating between duties under the NLRA and "contractual obligations that accrued" under a prehire agreement).

Although some language in *Jim McNeff* may have led the parties to believe that to be the proper strategy, the Supreme Court there expressly declined to address whether valid § 8(f) repudiations under the NLRA are also valid for § 301 purposes. *See* 461 U.S. at 271 n.13, 103 S. Ct. at 1759 n.13. Because of our resolution of the *Deklewa* issue, we easily conclude, however, that FWEC was not at liberty to repudiate the Agreement. We do not decide, as we need not, whether our decision as to the continued vitality of the Agreement for purposes of § 301 would have been different had we concluded that the defendants validly repudiated the Agreement for purposes of an unfair labor practice charge before the Board.

matter the election had been mooted). *See supra* at 11-12 n.4. Thus, the parties continued to be bound by the Agreement at the MOEPSI site until July 15, 1986, when FWEC within the window provided therefor properly terminated the Agreement in its entirety.[22]

III. THE EFFECT OF THIS COURT'S MANDATE ON THE ARBITRATOR'S FACTUAL FINDINGS

The arbitrator made several findings of fact in his arbitration decision, a decision which preceded the parties' second appeal to this Court. The two important facts found by the arbitrator were that (i) FWEC and EPC were a "single employer," and (ii) FWEC was the prime contractor at the MOEPSI site, contrary representations in the paper trail notwithstanding. The district court adopted those findings as its own, but then the parties appealed to this court, disputing the legality of the district court's arbitration order. On appeal we vacated some, but not all, of the district court's orders subsequent to the arbitration order. *See supra*

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22. The parties expend much effort debating the precise date of each defendant's supposed repudiation of the Agreement *See, e.g.*, Br. of FWC at 38-48; Br. of FWEC at 35-42; Reply Br. of LIUNA at 33-39; Reply Br. of FWC at 21-23; Reply Br. of FWEC at 10-16. Since we conclude that *Deklewa* operates retrospectively to this case, the issue of what constitutes a repudiation is mooted.

This disposition also allows us to avoid the question whether as a matter of choice of law we would need to apply the law of the Eleventh Circuit as defined by *Epley*, 764 F.2d at 1513-14 to the issue of repudiation.

at 15; *infra* at 43. Upon remand, the district court concluded that we had vacated all of its post-arbitration orders, including the one adopting some of the arbitrator's facts as its own.

The parties now dispute whether those findings survived our vacatur of portions of the district court's orders linked to the arbitration. The employers argue that our prior decision vacated the district court's entire order, including those factual findings; the union, conversely, maintains that those factual determinations survived and are now the law of the case. Because the answer lies in this Court's prior opinion in this case, we are called upon to interpret it.

On December 9, 1985, the district court ordered the defendants to "participate in an arbitration of the Plaintiff's grievance concerning the applicability of Section 1 of the parties' National Agreement [(Scope)] to the construction project." Order at 1-2. The court in its accompanying decision explained this order:

> I warn the parties not to attempt to confuse the narrow question I have found arbitrable with other issues such as majority representation, bargaining units and repudiation. Before anything else is to be determined in this suit, the threshold issue of whether the Section 8(f) agreement applies must be determined.

Mem. Op. at 19 (Dec. 9, 1985). After a hotly contested arbitration - the arbitrator conducted three days of hearings, reviewed 192 exhibits, and considered 299 pages of briefs -

Arbitrator Kagel concluded, *inter alia*, that (1) FWEC and FWC were alter egos; (2) EPC was a joint or single employer with FWEC; (3) EPC had been listed as the prime contractor on the MOEPSI site only to dupe LIUNA and that FWEC was the actual prime contractor; and (4) the Agreement obligated FWC and FWEC to apply its terms to the MOEPSI project. Mem. Op. at 2; *see* Op. & Dec. at 33-35 (Kagel, Arb.) (Nov. 10, 1986).

One year later, the district court partially granted plaintiff's motion to confirm the arbitrator's award. Order at 1 (Nov. 17, 1987). In its opinion, the court explained that the arbitrator's conclusion that FWC and FWEC breached the Agreement (derived from finding (4) *supra*), went beyond the scope of its reference and hence it would not defer to that finding, but it let stand his other conclusions. Mem. Op. at 7-10 ("Aside from his final conclusion regarding breach, the arbitrator's decision falls within the four corners of my intended submission.").

LIUNA now claims that FWEC in its earlier appeal to this Court argued only that *Deklewa* should not be applied retrospectively[23] and that it had repudiated the Agreement on or before June 6, 1985, but did not attack finding (2) to the effect that EPC and FWEC were a joint employer) or finding (3) (to the effect that FWEC was actually the prime contractor on the MOEPSI site), and submits that therefore

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23. On the parties' prior successful appeal we did not resolve that question, remanding the issue instead for the district court to reconsider in light of *Iron Workers, Local 3. See Laborer's Int'l Union*, 868 F.2d at 577.

both the findings became *res judicata*.[24] Assuming

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24. Assuming the validity of its premise that the defendants did not attack the entire judgment on their previous appeal, LIUNA appears to be correct on the *res judicata* point:

> If an appeal is taken from only part of the judgment, the remaining part is *res judicata*, and the vacation of the portion appealed from and remand of the case for further proceedings does not revive the trial court jurisdiction of the unappealed portion of the judgment.

1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[4.-3], at II-17 (2d ed. 1993); *see Habecker v. Clark Equip. Co.*, 942 F.2d 210, 218 (3d Cir. 1991)(stating that a district court may enter any order or reach any decision so long as it was neither disposed of by an earlier district court order *and* not pursued on appeal, nor disposed of by the appellate court's mandate in the earlier appeal); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982)(per curiam)("The district court is without jurisdiction to alter the mandate of this court on the basis of matters included *or includable* in defendants' prior appeal." (emphasis added)); *Aubrey v. Director, Office of Worker's Compensation Programs*, 916 F.2d 451, 456 (8th Cir. 1990)("failure to cross-appeal prohibits an appellee from attempting to enlarge her rights or to lessen her adversary's rights" upon remand (citing cases)); *Payne v. Travenol Lab., Inc.*, 673 F.2d 798, 816 & n.24 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S. Ct. 451 (1982). But if the appeal stems from the *entire* judgment and the judgment is reversed or vacated and the case remanded generally for further proceedings, the district court, barring some narrow exceptions finding no application here, must apply the mandate as established explicitly or by necessary inference by the appellate court (though it is free to reconsider other issues). *See, e.g., United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991); *Day v. Moscow*, 955 F.2d 807, 812 (2d Cir.), *cert. denied*, 113 S. Ct. 71 (1992); 1B MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.303[4.-1], at II-17; *id.* ¶ 0.404[10]; 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, &

arguendo that the defendants appealed from the district court's entire judgment rather than simply from some subset of issues, the decision would have established the law of the case solely with respect to those issues the decision reached explicitly or by necessary inference.

The parties did not include the initial notice of appeal in the record, and neither FWEC nor FWC asserts that it noticed its appeal from the entire judgment in its 1988 cross-appeal. Nonetheless, because it is not outcome-determinative, we will give the defendants the benefit of the doubt and assume that they noticed their appeal from the entire judgment. The defendants' case falters because (1) in their briefs on the earlier appeal they did not actually attack the district court's adoption of the arbitrator' actual findings; (2) this Court did not expressly or by necessary implication reverse the district court's earlier validation of the arbitrator's two factual findings; and (3) this Court did not vacate that portion of the district court's order adopting the factual findings. Consequently, the two findings became *res judicata* after the remand - hence, absent certain extraordinary circumstances, they were beyond the authority of the district court to revisit.

EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 792-94 (1981); *cf. In re Resyn Corp. (Resyn Corp. v. United States)*, 945 F.2d 1279, 1281-82 (3d Cir. 1991) (holding that issues raised but not reached on a prior appeal are not within the law of the case doctrine); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465 (1st Cir. 1984) (affirmance).

In the Statement of Issues in its 1988 appellate brief, FWEC posed the question "[w]hether the District Court erred in compelling Arbitration *on any issue* and in later failing to set aside the arbitrator's decision *in its entirety*." 1988 Br. of FWEC at 2 (emphasis added). But beyond that brief reference it never mentioned or developed that issue in its argument section. In fact, after asserting in a conclusory fashion that it *could* establish that the district court should have vacated the arbitrator's decision, FWEC stated that it "will not, however, address these issues herein because, although it would result in a reduction or total vacation of damages, it would require remand and trial and/or another arbitration which would serve only to prolong a small dispute which has been out of control for much too long." *Id.* at 5 (Statement of the Case).

To complicate matters, though, FWEC followed its disclaimer with the declaration that it would "adopt[] those arguments of . . . FWC which establish why the arbitrator exceeded his jurisdiction, why the District Court's refusal to overturn the Arbitrator's decision should be vacated and why the court's order compelling arbitration should be overturned." *Id.* at 5-6; See FED R. APP. P. 28(i) ("In cases involving more than one appellant or appellee, . . . any appellant or appellee may adopt by reference any part of the brief of another."). However, a

perusal of FWC's 1988 brief finds no argument that helps FWEC.[25]

LIUNA concedes that FWEC addressed the arbitration issue in its 1988 reply brief (which was not placed in the record), *see* Reply & Opp'n Br. of LIUNA at 31, but argues that by then it was too late to do so. We agree. An issue is waived unless a party raises it in its opening brief, and for those purposes "a passing reference to an issue . . . will not suffice to bring that issue before this court." *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991) (plurality opinion) (Becker, J.), *cert. denied*, 112 S. Ct. 1671 (1992); *International Raw Materials v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327 n.11 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1588 (1993). Accordingly, unless the 1989 decision reversed that portion of the district court's order affirming the arbitrator's findings of fact or vacated the corresponding portion of its order, FWEC's

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25. FWC raised four issues on appeal. First, it argued that the district court improperly compelled *it* (FWC) to submit to arbitration since it was not a signatory to the Agreement; FWEC being a signatory, the argument did not pertain to it. 1988 Br. of FWC at 14-24. Second, it argued that if it were bound by the Agreement, the FWEC's and EPC's repudiations were effective as to it too. *Id.* at 25-31. Third, FWC did argue that the arbitrator's award should be set aside, but it did not challenge the arbitrator's factual filings, restricting itself to arguing that the arbitrator erred in considering "external law" when he construed the Agreement. *Id.* at 31-34. Although FWC prayed for relief that the entire arbitration aware be vacated, it advanced no arguments addressing why the factual findings in particular should have been vacated. Fourth, FWC argues *Deklewa* should not be retrospectively applied to this case. *Id.* at 34-40.

failure to contest those points on appeal renders them *res judicata*. *See supra* at 40-41 n.24.

Nowhere did the 1989 decision reverse the district court's order adopting the facts, although it did vacate the district court's orders "predicated on the assumption that FWEC was FWC's alter ego." *Laborer's Int'l Union*, 868 F.2d at 577. We conclude that the 1989 decision did not vacate the district court's ratification of the arbitrator's two findings of fact (which had to do with FWEC and EPC's relationship) because that portion of the district court's order was the *only* portion of the order which both was not predicated on the alter ego finding and remained contested.[26] We hesitate to construe a carefully crafted

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26. The district court issued three "subsequent orders." First, the district court denied defendants' motion to vacate the arbitration decision and granted plaintiff's motion to affirm it except insofar as the arbitrator found that the defendants breached the Agreement. As should be clear, while some of the arbitration decision was predicated on the assumption that FWEC was FWC's alter ego, *see* 868 F.2d at 577, the two factual findings at issue which the court had embraced were not, as they dealt exclusively with the relationship obtaining between FWEC and EPC. Second, the court denied defendants' motion for summary judgment and partially granted plaintiff's motion for summary judgment. This order was obviously predicated on the defendants' alter ego status, hence it was vacated. Third, the court ordered the parties to stipulate to damages within 60 days or the court would hold a further hearing to "determine the appropriate forum and procedure by which said issue may be resolved." Order at 1-2. Because the parties stipulated to damages prior to taking the 1989 appeal, this order had already been rendered moot. Thus, by necessary implication, the district court's confirmation of the arbitrator's two factual findings must have been the portion of the district court's "subsequent orders" which this Court did not vacate.

vacatur as having vacated the entire matter under review. This interpretation is reinforced by the absence of any reason this Court would have had for vacating those particular factual findings and requiring a duplication of effort: FWEC was properly compelled to arbitrate those factual issues, and an arbitrator eventually would have needed to resolve them anyway to settle FWEC's liability.

Nevertheless, the district court interpreted this Court's 1988 mandate to vacate all of the arbitrator's factual findings. Mem. Op. at 5 n.3. Therefore, the court decided to "review this matter afresh." *Id.* Unfortunately, that alternative route ignores the fact that the parties had contractually agreed to have exactly these questions answered by an arbitrator. The moment FWC conceded that it was FWEC's alter ego, the central question whether it could be compelled to arbitrate the dispute was affirmatively answered, and the district court should thereupon have dispatched the parties to arbitration as soon as it determined the effective repudiation/ termination date of the Agreement. *See infra* at 51 n.32.

In any event, we believe that the district court misconstrued this Court's mandate. Even if this Court meant to vacate the order compelling FWEC (as opposed to FWC) to submit to arbitration, an issue which was not presented to this Court,[27] as stated above, we did not vacate the district

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27. This Court vacated the arbitration order because the district court, not the arbitrator, was to decide whether FWC was bound by the Agreement, since if it were not bound, it could not be commanded to submit to arbitration. *See* 868 F.2d at 576-77. The reason is

court's subsequent confirmation of the arbitrator's factual findings. Accordingly, the arbitrator's findings once adopted by the district court, namely, that FWEC and EPC were a single employer and that FWEC was really the *prime* contractor at the MOEPSI site, are *res judicata*, and the district court should not have revisited them.

IV. THE ARBITRABILITY OF THE ISSUES OR BREACH AND DAMAGES

A. *Introduction*

Where no factual determinations are involved, this Court reviews the district court's decision to send the issues of damages and breach to arbitration as a matter of law. *See Sheet Metal Workers Int'l Ass'n, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278-79 (3d Cir. 1991) ("We have plenary review on whether the terms of the collective bargaining agreements are ambiguous. Moreover, we review *de novo* the district court's construction of the collective bargaining agreements, which is a question of law." (citation omitted)); *cf. Lukens Steel Co. v. United Steelworkers*, 989 F.2d 668, 672 (3d Cir. 1993)(where a collective bargaining agreement is ambiguous and the parties' intent is controlling,

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straightforward; a party cannot be compelled to arbitrate the arbitrability issue. *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 111 S. Ct. 2215, 2226 (1991). As a signatory to the Agreement, FWEC was unquestionably obligated to arbitrate the dispute. FWC, on the other hand, was not a signatory thereto, and hence the court could direct it to arbitration only if the court first determined that somehow FWC had become bound by the Agreement.

the scope of review is for clear error). *See generally Ram Constr. Co. v. American States Inc. Co.*, 749 F.2d 1049, 1052-53 (3d Cir. 1984) (comparing when plenary and clear error review is appropriate). Our primary guide is the strong federal labor policy favoring arbitration, a policy in large part premised on the arbitrator's superior expertise in the mechanics of collective bargaining and collective bargaining agreements, greater understanding of the law of the shop, and greater efficiency in resolving labor disputes. *See Luden's Inc. v. Bakery, Confectionery & Tobacco Workers' Int'l Union Local 6*, -- F.3d --, -- (3d Cir. 1994).

The parties inserted an extremely capacious arbitration clause into the Agreement; it provided that "all grievances and disputes [over the application or interpretation of this Agreement], excluding jurisdictional disputes, shall be handled as hereinafter provided."[28] Agreement art. XV. Given the jurisprudence in this area, *see, e.g.*, A T & T *Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986) ("'[An] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputer. Doubts should be resolved in favor of coverage,'" (quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83, 80 S. Ct.

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28. A jurisdictional dispute in this context signifies not a dispute over the application of the Agreement to a specific construction site, but rather a dispute over the proper labor organization to be assigned a given job. *See Id.* art. XIV. *See generally* II CHARLES J. MORRIS, THE DEVELOPING LABOR LAW, at 1366-98 (3d ed. Patrick Hardin ed. 1992).

1347, 1352-53 (1960))), neither defendant could plausibly argue that such an inclusive arbitration clause can be read to exclude a dispute over whether the agreement applies to a certain work site or not, and neither does.

B. *The Enforceability of Arbitration Clauses in Prehire Agreements*

Defendants do argue that prehire agreements are not subject to arbitration and attempt to anchor this innovative argument in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S. Ct. 1753 (1983). In *Jim McNeff* a union brought suit under § 301 of the LMRA, 29 U.S.C.A. § 185 (1978), complaining that the employer had breached a prehire agreement by failing to make contributions to the unions's fringe benefit trust fund. The Court made no mention of an arbitration clause, but alluded to the "critical distinction between an employer's obligation under the [NLRA] to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract." *Jim McNeff*, 461 U.S. at 267, 103 S. Ct. at 1757. Thus, the Court held that while an employer must not *bargain* with the union before the union obtains majority status, the conditions of § 9(a) of the NLRA not having been fulfilled, when a union and employer enter into a prehire agreement, "both parties must abide by its terms until it is repudiated." *Id.* at 271, 103 S. Ct. at 1759. We note that *Jim McNeff* predated *Deklewa*, and thus at the time either party could have unilaterally repudiated a prehire agreement without contravening the NLRA (that is, the *R.J. Smith* rule was then in effect). *Ibid.*

The defendants maintain that *McNeff* implies quite the opposite of what it says. They urge that a signatory to a prehire agreement containing an *arbitration* clause cannot be compelled to arbitrate until the § 8(f) prehire agreement has been transmogrified into a § 9(a) collective bargaining agreement. Br. of FWEC at 48-49. Without giving any reason for so doing, the defendants attempt to confine *Jim McNeff* to its narrow holding that "the monetary obligations assumed by an employer under a prehire contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit." *Id.* at 271-72, 103 S. Ct. at 1759. Based on this niggardly understanding of *Jim McNeff*, they contend that LIUNA is limited to recovering damages in the district court. But clearly their reading of *Jim McNeff* misses its essential point that the terms of an operative prehire agreement are enforceable despite the union's lack of majority status. The Court analyzed the statutory text and purposes of § 8(f) to arrive at this preeminently logical conclusion.

FWEC additionally attempts to distinguish *Jim McNeff* on the ground that here FWEC repudiated the Agreement *before* LIUNA sought arbitration, whereas in *Jim McNeff* the prehire agreement remained in effect throughout the litigation. Reply Br. of FWEC at 18. But even if that distinction could hold water, which it cannot, *see Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 111 S. Ct. 2215, 2225 (1991)(holding that a postexpiration grievance is subject to arbitration if the grievance "involves facts and occurrences that arose before expiration"); *Nolde Bros. Inc. v. Bakery & Confectionary Workers Union*, 430 U.S. 243,

255, 97 S. Ct. 1067, 1074 (1977)("the parties' failure to exclude from arbitrability contract disputes arising after termination . . . affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship"), the retrospectivity analysis we engaged in eliminates that distinction: since *Deklewa* applies retrospectively, the parties continued to be bound by the Agreement at the MOEPSI site until FWEC terminated it effective July 15, 1986, a long time ago but still almost a full year after LIUNA instituted this action to compel arbitration.

C. *Relevancy of the Merits of the Dispute*

The defendants also argue that arbitration is improper in this case in particular because no damages can flow from a finding they breached the Agreement, as LIUNA operated an illegal hiring hall. They are correct that discriminatory hiring halls are probably illegal, *e.g., NLRB v. International Bhd. of Elec. Workers Local 322*, 597 F.2d 1326, 1330 (10th Cir. 1979), that they apparently violate the Agreement, *see* Agreement art. V §§ 1-2, that the district court found the local hiring hall to be run in a discriminatory fashion, *see* Mem. Op. at 18 n.6, and, the local union having been under LIUNA's trusteeship since May 1984, that LIUNA cannot distance itself from the illegal conduct. Thus it may very well be true that LIUNA is entitled to no damages.[29]

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29. However, if LIUNA may recover damages on behalf of its injured membership, this equitable defense may not aid defendants with respect to LIUNA's membership, even if dispositive vis-a-vis LIUNA.

We cannot be certain of that, however, as the correct answer completely depends on the interpretation to be given the Agreement. Because it appears that neither defendant *in fact* suspected that the union hiring hall was being run illegally until well after the filing of the complaint in this case, and because of the defendants' deception described earlier, the arbitrator may have to name a winner in the battle of the unclean hands. It may also be that, insofar as FWEC never attempted to invoke the Agreement and make use of MBTC's hiring hall (i.e., insofar as FWEC never tendered performance), it cannot establish LIUNA even breached, much less materially breached, the Agreement by not having a non-discriminatory hiring hall available for its use.

The arbitrator may also deem it possible that, had FWEC requested referrals from MBTC's hiring hall, the hall would have ceased its illicit ways and changed its procedures to bring the local into compliance with the Agreement and the law. That is, LIUNA's illegal operation of a hiring hall with respect to other employers would not *necessarily* mean it would run the hall the same way with FWEC and hence excuse FWEC's non-compliance with the Agreement. Alternatively, the arbitrator could perhaps construe the Agreement to have forbidden FWEC from repudiating the entire Agreement until it had provided LIUNA with a

reasonable opportunity to cure by bringing its hiring hall into compliance with the law and the terms of the Agreement.[30]

All this is not to imply LIUNA is entitled to damages, but only to show that an arbitrator *might* award LIUNA damages. It is not our place to resolve or even to speculate on the solution to the questions we have posed in the preceding paragraph or to others which we have not raised, because they are matters of interpretation of the parties' pre-hire agreement, and as such are matters the parties entrusted to the sound judgment of a labor arbitrator. A court cannot refuse to order arbitration based on its perception of the frivolousness of the claim or the futility of doing so. *See, e.g., A T & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50, 106 S. Ct. 1415, 1419 (1986) ("Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator."); *Beck v. Reliance Steel Prods. Co.*, 860 F.2d 576, 579 (3d Cir. 1988).

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30. Although the district court charged LIUNA with constructive knowledge of the illegality of the local hiring hall's procedures because it had placed the local in trusteeship, there is no evidence in the record that LIUNA officials actually knew that the hall was being run illegally. In fact, the evidence indicates that no party ever complained that the hiring hall was discriminating against non-union members. Perhaps, given the stakes, LIUNA would have promptly remedied the deficiency had someone brought it to LIUNA's attention.

Moreover, as the Supreme Court has explained, the arbitrator's informed judgment is "especially [helpful in reaching a fair solution to a problem] when it comes to formulating remedies." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41, 108 S. Ct. 364, 372 (1987) (emphasis and internal quotations omitted). In light of these considerations, we conclude that the district court's finding that LIUNA operated an illegal hiring hall provides no reason to deny LIUNA's prayer for relief, compelled arbitration.

D. *What Should Be Arbitrated*

We also conclude that on remand the district court should compel *both* FWEC and FWC to submit to arbitration. FWEC should arbitrate the dispute because it is a signatory to the Agreement. And as FWEC's admitted alter ego, FWC should also be ordered to submit to arbitration. As this Court's opinion in the parties' prior appeal made abundantly clear, the defendants' stipulation that FWC and FWEC were alter egos[31] was critical to the determination

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31. The colloquy at trial was as follows:

> THE COURT: It is my understanding . . . that it is the defendants' position today that they are going to drop the alter ego issue before this Court. Is that correct?
> MR APRUZZESE: We do not choose to contest it, your Honor.
> THE COURT: I assume there's no objection. . . .
> MR. GREEN: . . . The plaintiff has no objection to that amendment (sic).

Tr. at 6 (Jan. 22, 1991).

of the arbitrability of LIUNA's claim against FWC, since unless the defendants were alter egos the district court could not compel FWC to arbitration under the Agreement. *See Laborers' Int'l Union*, 868 F.2d at 576-77 ("The district court erred by letting an arbitrator determine whether FWC was an alter ego of FWEC and hence a party to the National Agreement. That question is for the district court, not an arbitrator."). Accordingly, that concession will now be enforced.

The validity of the Agreement and the expansiveness of its arbitration clause having already been established, once the defendants made this concession the district court's role in the grievance should have been over. It should not have entertained the case beyond establishing those facts necessary to determine that the defendants were duty-bound to arbitrate LIUNA's grievance. Accordingly, its conclusion that the defendants breached the Agreement exceeded its authority - the broad arbitration clause reserved for an arbitrator the power to answer that question.[32]

V. CONCLUSION

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32. We have assumed throughout this opinion without having expressly decided that the court, not the arbitrator, is the proper body to decide the date of repudiation insofar as it impacts the extent of the parties' duty to arbitrate. Because the parties have not briefed the question, and seem to have accepted that as proper, both parties have waived the issue, and our treatment of that issue does not imply that a court is always the proper forum to address it.

Because the Board's ruling in *Deklewa* applies retrospectively to the parties, FWEC never successfully repudiated the Agreement as to any location prior to its total termination of that agreement in July 1986. The Agreement contains a broad, inclusive arbitration clause, one whose reach extends to whether the Agreement governs operations at a specific construction site or not. Therefore, FWEC must arbitrate the dispute over application of the Agreement to the MOEPSI site with LIUNA according to the procedure specified in Article XV thereof. Since FWC is FWEC's alter ego, it too must comply with Article XV of the Agreement and proceed to arbitration alongside its subsidiary.

Accordingly, we will reverse the district court's June 22, 1992 order insofar as it concludes that *Deklewa* does not apply retrospectively to this case, that our earlier mandate vacated the arbitrator's two factual findings, and that the defendants breached the Agreement. We will remand with instructions that the court modify its June 22, 1992 Order, as revised by the orders of March 11, and 31, 1993, to direct the parties to submit to arbitration the issues of breach and the amount of damages allegedly sustained by LIUNA, its local, and its membership[33] on account of FWEC's alleged breach of the pre-hire agreement at the MOEPSI site up to the date of FWEC's effective termination of the Agreement, July 15, 1986.

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33. We intimate no view whether LIUNA may pursue or recover damages on behalf of its local affiliate and/or membership under the facts of this case.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 16

F. Edward Hebert Federal Building - Room 600

600 South Maestro Place 504-589-6396

New Orleans, LA 70130
19 September 1985 Re: Foster Wheeler Energy Corporation
Metairie, Louisiana
Case No. 15-CA-9738

Orrin Baird, Esquire
Connerton, Bernstein & Katz
1899 L Street, N.W., Suite 800
Washington, DC 20036

Dear Mr. Baird:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings on the charge are not warranted inasmuch as the investigation disclosed that the National Agreement between Foster Wheeler Energy Corporation (herein called NEC) and the Union is an 8(f) contract and the Union has failed to demonstrate that it has, at any time material herein, achieved

the required majority status in an appropriate unit as envisioned by Section 9(a) of the Act to warrant a finding that FWEC has violated Section 8(a)(5) and (1) of the Act by not providing the Union with the information it requested. *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971), enforcement denied sub nom. *Local 150, International Union of Operating Engineers, AFL-CIO v. NLRB*, 480 F. 2d 1186 (C. A. D.C. 1973), on remand, 208 NLRB 615; *Ruttman Construction Co.*,191 NLRB 701; *Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977); cf. *NLRB v. Iron Workers, Local 103 (Higdon Contracting Co.)*, 434 U. S. 335 (1978); *Acme Marble & Granite Co., Inc.*, 271 NLRB No. 147 (1984). I am, therefore, refusing to issue a complaint in this matter. The procedure for filing an appeal in this matter is enclosed.

Very truly yours,

/s/ Hugh Frank Malone
Hugh Frank Malone
Regional Director

CERTIFIED MAIL 96117
Return Receipt Requested
Enclosures

cc: Laborers' International Union of North America, AFL-CIO
905 - 16th Street, N.W.
Washington, DC 20006

Stuart Rothman, Esquire
Rogers & Wells
1737 H Street, N.W.
Washington, DC

20006

Foster Wheeler Energy
Corporation
2626 North Arnoult, Suite 201
Metaire, Louisiana 70002

NATIONAL LABOR RELATIONS BOARD
REGION 23
Bob Casey Federal Building/Courthouse
515 Rusk Street Room 4014
Houston, Texas 77002 Telephone 229-3726

September 20, 1985

Connerton, Bernstein & Katz
Attn: Orrin Baird, Esquire
1899 L Street, N. W., Suite 800
Washington, D. C. 20036

Re: Energy Plant Constructors, Inc.
Case 23-CA-10131

Dear Mr. Baird:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted inasmuch as the evidence charged employer in this matter, has any collective-bargaining relationship with the Laborers International Union or any obligation to recognize and bargain with the Union. While the Union alleges that Energy Plant Constructors is an alter ego, a joint employer, a single employer with or a controlled company of Foster Wheeler Energy Corporation, which does have a collective bargaining relationship with the

Union, the evidence fails to establish that such relationships exist or that Energy Plant Constructors has incurred any obligation to bargain with the Union as a result of any relationship it may have with Foster Wheeler Corporation or Foster Wheeler Energy Corporation. Moreover, the contract between Foster Wheeler Energy Corporation and the Union appears to be a pre-hire agreement permitted by Section 8(f) of the Act. Even assuming that that contract could be said to have applied to Energy Plant Constructors, the Employer effectively repudiated the agreement. As the Union has not demonstrated that the pre-hire contract was converted to a Section 9(a) relationship it cannot be argued that a bargaining obligation was established. In any event, if such an obligation were to exist based on the contract with Foster Wheeler Energy Corporation, any refusal to supply information allegedly in violation of Section 8(a)(5) should be pursued in charges against that entity. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, and a copy with the Regional Director. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on October 3, 1985. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office

of Appeals in Washington, and a copy of any such request should be submitted to the Regional Director.

If you file an appeal, please complete the notice form I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice form should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated below.

Very truly yours,

/s/ Louis V. Baldovin, Jr.
Louis V. Baldovin, Jr.
Regional Director

Enclosures
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: General Counsel, National Labor Relations Board, Washington, D.C. 20570
Darby & Danner, Attn: Willis C. Darby, Jr., 200 St. Anthony Street, P.O. Box 2365, Mobile, Alabama 36652
Energy Plant Constructors, Inc., Attn: E. O. Self, 9700 Richmond Avenue, Suite 300, P. O. Box 42999-MS597, Houston, Texas 77042
Laborers' International Union of North America, AFL-CIO, 905 16th Street, N. W. Washington,

D. C. 20006
Laborers' International Union of North America, AFL-CIO, Attn: R. P. Vinall, Vice-President, 1324 Park Place Boulevard, Suite 210, Hurst, Texas 76053
Foster Wheeler Energy Corporation, Attn: Mr. Orson Zinglersen, 2626 No. Arnoult, Suite 201, Metairie, Louisiana 70002

Foster Wheeler Corporation, Attn: Mr. Harold Kennedy, 110 So. Orange Avenue, Livingston, New Jersey 07039

Rogers & Wells, Attn: Stuart Rothman, 1737 H. Street, N.W., Washington, D.C. 20006

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 22
Peter D. Rodino Jr. Federal Building - Room 1600
970 Broad Street
Newark, NJ 07102

September 26, 1985

Orrin Baird, Esq.
Connerton, Bernstein & Katz
1899 L. Street, N.W., Suite 800
Washington, D. C. 20036

Re: Foster Wheeler Corporation
Case 22-CA-13975

Dear Mr. Baird:

The above-captioned case alleging a violation under Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings on the charge are not warranted inasmuch as the investigation disclosed that Foster Wheeler Corporation is not a party to any collective bargaining agreement with the Union. A request for information concerning an alleged double-breasted operation must be made to an entity that has recognized the Union, and where the Union has majority status, and thus Foster Wheeler Corporation is not the proper

entity from which to seek information. In addition, the National Agreement between Foster Wheeler Corporation, and the Union is an 8(f) contract and the Union has failed to demonstrate that it has, at any time material herein, achieved the required majority status in an appropriate unit as envisioned by Section 9(a) of the Act to warrant a finding that Foster Wheeler Corporation, in the guise of FWEC, has violated Section 8(a)(5) and (1) of the Act by not providing the Union with the information it requested. *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971); enforcement denied sub nom. *Local 15 International Union of Operating Engineers, AFL-CIO* v. *NLRB*, 480 F. 2d 1186 (C.A.D.C., 1973), on remand, 208 NLRB 615; *Ruttman Construction Co.*, 191 NLRB 701; *Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977); cf. *NLRB* v. *Iron Workers, Local 103 (Higdon Construction Co.)*, 434 U.S. 335 (1978); *Acme Marble & Granite Co., Inc.*, 271 NLRB No. 147 (1984). I am, therefore, refusing to issue a complaint in this matter.

In the event you wish to file an appeal form this determination, your attention is directed to the attached NLRB Form 4938 which provides instructions for the filing of an appeal within 13 days from the date of this letter.

Very truly yours,

/s/ Arthur Eisenberg
Regional Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Enclosures

General Counsel, NLRB
Washington, D. C. 20570

Laborers' International Union
of North America, AFL-CIO
905 - 16th Street, N. W.
Washington, D. C. 20006

Foster Wheeler Corporation
110 S. Orange Avenue
Livingston, New Jersey 07039

FORM "__" "__"
(7 82)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

ENERGY PLANT CONSTRUCTORS, INC.

Employer/Petitioner

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and
LOCAL UNION NO. 70, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO[1/]

Union

Case No. 15-RM-387

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was had before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned

Upon the entire record[2/] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3/]

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4/]

3. The labor organization(s) involved claim s to represent certain employees of the Employer.[5/]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[6/]

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All field construction employees including craftsmen, helpers, and laborers[7/] employed by the Employer at its MOESPI, South Mobile County, Alabama, jobsite; excluding all other employees, including material clerks,

quality control, warehouse, office clerical, technical and professional employees[8/] guards and supervisors[9/] as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily "__" off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharge for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and LOCAL

UNION NO. 70, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the ex"__" statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be "__" communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman Gordon Company,* 394 U.S. 759 (1969) Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Ofc., F. Edward Herbert Bldg., 600 S. Ma"__" "__"., 6th Floor, New Orleans, LA 70130 on or before 25 November 1985. No extension of time "__" be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the request "__" here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102 67 of the Board's Rules and Regulations "__" for review of this D"__" be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW

Washington D.C. 20570. This request must be received by the Board in Washington by 2 December 19"__".

Date 18 November 1985

at New Orleans, Louisiana

Regional Director, Region 15

1/ The Union's name appears as amended at the hearing.

2/ After the close of the hearing, the Employer moved to supplement the record by including a letter dated 17 July 1985 from Angelo Fosco, General President of the Union, to E. O. Self, President of the Employer. This document was apparently inadvertently omitted from the Union's motion to dismiss the petition for lack of a question concerning representation. Inasmuch as the Union has filed no opposition to the inclusion of this document in the record and receipt of said document is necessary to fully understand the Union's motion to dismiss, I grant the Employer's motion to include this document in the record.

After the hearing closed, Counsel for the Union moved for a second time to introduce into the record copies of the construction agreement between Mobil Oil and Employer/Petitioner for construction of the MOEPSI gas plant and a deposition of Stanley C. Smith, project manager for Mobil's gas plant, concerning negotiations between Employer/Petitioner, Foster Wheeler, and Mobil about the gas plant construction. During the hearing, Counsel contended that these documents would allegedly show the alter ego and/or single employer status of Foster Wheeler and Employer/Petitioner and thus prove the existence of a contract bar preventing the processing of the instant petition. At no point during the hearing did Counsel for the Union request that the record be left open for receipt of these documents. Based upon this omission and more importantly the fact that the issue

recognition, or engaged in picketing or threats thereof to achieve recognition by the Employer/Petitioner. The Employer/Petitioner contends that the Union by its action in seeking to impose the terms and conditions of its national agreement with Foster Wheeler Energy Corporation (FWEC) upon it and its construction employees working at Mobil Oil Exploration & Producing Southeast, Inc. (MOEPSI) jobsite has in effect requested recognition thereby warranting the processing of this petition. The record shows that by letters of 9 April 1985 from General President Fosco the Employer and three other corporate entities, Foster Wheeler Corporation (FWC), Foster Wheeler Energy Corporation (FWEC) and Foster Wheeler International Corporation (FWIC) the Union claimed that said corporations were bound to, but refusing to comply with, unspecified collective-bargaining agreements between the corporations and the Union. As a remedy for the alleged contract violation Fosco sought backpay, fringe benefits, and dues payments for all workers improperly denied employment at the MOEPSI jobsite. Attached to the 9 April letters, which the Union described as grievances, were requests for extensive information about the corporate structures and operations of each company. On 3 June 1985, by letter to Fosco, Self, on behalf of the Employer, denied that it was a party to any collective-bargaining agreement with the Union and in the alternative stated that if it was bound by any such agreement the Employer was immediately cancelling such agreements and reserving its rights to

petition the Board for determinations of majority status and appropriate units. On 17 July 1985 by letter to Self, Fosco claimed that the Employer was a single, joint, or alter ego employer with FWC and FWEC and that as such it was bound by FWC and FWEC;s national agreement with the Union inasmuch as that agreement was not a pre-hire agreement but rather a fully enforceable Section 9(a) agreement. On 28 August 1985, the Union filed suit against FWC and FWEC in the United States District Court of the District of New Jersey claiming that the Employer, FWC, FWEC, FWIC were single employers or alter egos and seeking an order compelling FWC and FWEC to arbitrate the alleged contractual violations.

The Union claims that its actions did not constitute a request or demand for recognition but were mere attempts to secure information and compel arbitration of its grievances. Article II, "Union Recognition" of the national agreement which the Union seeks to impose upon the Employer reads as follows:

> The Employer hereby recognizes and acknowledges the Union as the exclusive bargaining representative of all field construction employees performing work covered by this agreement with respect to wages, hours, and all other terms and conditions of employment.

> This Agreement shall not apply to executives, superintendents, assistant superintendents, timekeepers, messengers, clerical office workers, guards, confidential employees or any employees above general foreman.

While the Union disclaims any attempts at recognition, its action in seeking to impose the terms of the national agreement including Article II upon the Employer are inconsistent with such disclaimers. Rather the Union's action in seeking arbitration and monetary relief for all periods of time prior to and after any asserted repudiation is tantamount to a demand for recognition as majority representative warranting the processing of this petition. See *Construction and General Laborers No. 304 (Paul E. Iacono Structural Engineers Inc.)*, 245 NLRB 346 (1979); *Petrie's*, 108 NLRB 1318 (1954). Moreover, the Union's assertion that the national agreement acts as a contract bar is inconsistent with its disclaimer. *Doak Aircraft Co. Inc.*, 110 NLRB 792, 793 (1954). Accordingly, I deny the Union's motion to dismiss and find that its action in attempting to apply the terms of its national agreement upon the Employer constitutes a demand for recognition.

The Union, contrary to the Employer, contends that the national agreement constitutes a contract bar preventing the undersigned from processing the instant petition. Article I, "Scope of

Agreement" of the national agreement reads in pertinent part as follows:

> This agreement shall apply on all construction projects within the United States, except for the state of New Mexico, Oklahoma and Texas, performed by the Employer or any person, firm or corporation owned or financially controlled by the Employer.

The national agreement was signed on 16 February 1977 and amended on 15 July 1981. This agreement by its terms continued in effect until 15 July 1981 and from year to year thereafter until notice of termination was given in writing 60-90 days before its expiration. The contract was clearly negotiated before the existence of the MOEPSI project which commenced in 1985. The record contained no evidence which would establish that at any time since February 1977 has the Union represented a majority of the employees of either FWC, FWEC, or Employer/Petitioner in an appropriate bargaining unit. Accordingly, I conclude that the National Agreement constitutes a Section 8(f) pre-hire agreement under the Act. While such agreements are permissible in the construction industry under Section 8(f), they may be cancelled by an employer such as Employer/Petitioner who has petitioned the Board for a determination of the Union's majority status. Under Board law, Section 8(f) agreements clearly do

not act as contract bars. *Alburquerque Insulation Contractor, Inc.*, 256 NLRB 61, 62-63 (1981). The Union presented no evidence to show that its national agreement was anything but a pre-hire agreement. As noted, there was no evidence to suggest that at any time the Union represented a majority of the construction workers in a stable work force at any site of Employer/Petitioner. Where as in the present case an employer hires on a job-by-job basis and does not transfer workers from jobsite-to-jobsite, the union must establish its majority at each worksite before it can claim a Section 9(a) contractual status.

7/ The parties disagree over the composition of the unit. The Union would limit the unit to include only construction laborers. The Employer/Petitioner would include all field construction employees including helpers and craftsmen. The craftsmen include pipefitters, pipe welders, instrument fitters, electricians, millwrights, IW-structural/riggers, heavy and light equipment operators, surveyors, carpenters, concrete finishers, IW-rebar, mechanics and painters.

The Employer/Petitioner is a wholly owned subsidiary of Foster Wheeler Corporation with corporate offices located at 9700 Richmond Avenue, Houston, Texas. The Employer/Petitioner maintains a divisional office at LaPorte, Texas where it stores construction equipment that is not being used on jobsites. The Employer/Petitioner hires employees on a project-by-project basis and with the exception of higher management does not transfer construction site employees between jobsites. The chairman and chief executive officer for the Employer/Petitioner is

Jack H. Kennedy. Kennedy serves as vice president and group executive for Foster Wheeler Corporation. Reporting to Kennedy is president and chief operating officer, E. O. Self and R. D. Harris, controller. Self is responsible for the overall supervision of Employer/Petitioner's construction, management, business development, commercial, personnel and safety operations. Reporting to Self are vice presidents G. W. Talbert, M. R. King, R. D. Daeschner; general manager W. D. Huff; and managers Ian Baxter and A. L. Hill.

At the MOESPI jobsite, the only location involved in these proceedings, the Employer/Petitioner employs site manager, W. L. Walker. Walker reports directly to Talbert and is responsible for the overall construction at the site. Reporting directly to Walker is project superintendent, J. B. Watts who is responsible for supervising the work of civil superintendent, Corral Traham; Charles Windham, mechanical superintendent; piping superintendent, Art Butler; and instrument and electrical superintendent, Lloyd Graves. These superintendents in turn direct the work of general laborers, riggers, pipefitters, instrument/electricians, carpenters, foremen plus rebar and concrete employees, millwrights, and pipe shop foremen. The general foremen and foremen direct the work of individual crews consisting of laborers as well as various craftsmen and their helpers. As of the hearing date, the Employer employed 125 craftsmen, 72 helpers, and 82 laborers or a total complement of 207 employees working

under the supervision of 6 general foremen and 31 foremen. Although the work at the "__" was only 25% complete as of the hearing, it is clear from the record that Emplo"__" Petitioner employed most of the unit employees that it would need for the completion of its construction operations.

In March 1985, Self, Talbert and Walker determined construction personnel wage rates based upon a Employer/Petitioner survey of wage rates in the greater Mobile area. Laborer wage rates range from $5-$7 per hour. Helpers are paid between $7-$8.50 per hour. Craft employees on the other hand are paid between $11-$11.70 per hour. Working schedules for construction employees consists of four 10 hour days, Monday through Thursday with a weekend shift of three 13 hour days from Friday through Sunday.

All construction employees including the laborers and craftsmen work the same basic work schedule in composite work crews under the immediate supervision of 5 general foremen and 4 foremen. In these crews laborers work with pipefitters, welders, operators, riggers, millwrights, electricians, instrument me"__" and rebar employees on designated job assignments. There are no job descriptions or traditional craft lines observed on the job. Craftsmen frequently perform work outside of their immediate craft discipline. Assisting them are helpers, 30 of whom were promoted from the position of laborer. Craftsmen have separate sheds where they store their tools, eat lunch, and use as shelters in case of inclement whether. Laborers also

use these sheds as shelters and places to eat lunch. All construction employees work under similar work and safety rules but have no fringe benefits. They utilize the same entrances, parking lot, bathrooms and vending machine facilities.

Laborers spend about 80 to 90 percent of their time digging ditches. On other occasions they work with the crafts in unloading material and doing rigging work. In contrast with other crafts, laborers are unskilled personnel performing essentially unskilled tasks. While the Employer has no apprenticeship program for laborers it provides training for them in the helper classification where they have the opportunity to work directly with various craftsmen. From the beginning of the job, 30 laborers, as noted above, have been promoted to the position of helpers while only two laborers who possessed prior craft skill were promoted directly to craft positions as they became vacant. With the exception of the initial start of construction, craftsmen have not performed any laborer work. Also, unlike craftsmen, the Employer hired the laborers with minimal interviews on a trial basis by having the personnel clerk select applicants for interview based upon the date of their application.

From the record however it is clear that all work performed by craftsmen, helpers, and laborers is closely coordinated on each job with all construction workers working under similar working conditions. While the record shows a considerable disparity in wages and job skills among unit employees, it does not show that the laborers have a

separate "craft" identity or comprise a functionally distinct group so as to warrant their inclusion in a separate unit. In the construction industry the Board has found appropriate separate units of craft employees and also separate units of clearly identifiable and functionally distinct groups of employees including construction laborers thereby rebutting the presumptive appropriateness of overall employee units. *Brown and Root, Inc.*, 258 NLRB 1002, 1003 (1981). However, in those cases the records clearly showed a distinct craft or functional group identity which is not present in this case. In this case, the record shows that a substantial number of helpers have performed laborer work in the past and that the laborers work closely on teams with helpers and craftsmen performing unit work under similar working conditions. Under these circumstances, I find that the union has not overcome the presumptive appropriateness of an overall unit consisting of all laborers, helpers, and craftsmen. Accordingly, I find such a unit to be appropriate and reject the Union's request for a more limited unit. *Atlanta Division of S. J. Groves and Sons Company*, 267 NLRB 175 (1983).

8/ The parties agree, and I find, that the material clerks, quality control, warehouse, office clerical, technical and professional employees should be excluded from the unit. The record shows that these employees perform no manual construction work, are separately supervised, and work under different conditions from and having minimal contact with unit employees. Accordingly, I shall exclude them from the unit.

9/ Although the parties did not stipulate to the supervisory status of Employer/Petitioner's management personnel, I find based upon the record that the following individuals possess the authority to either hire, discipline or responsibly dire employees and as such are supervisors within the meaning of the Act and should be excluded from the unit: W. L. Walker, site manager; J. B. Watts, project superintendent; Corral Traham, civil superintendent; Charles Windham, mechanical superintendent; Art Butler, piping superintendent; and Lloyd Graves, instrument/electrician superintendent. The record shows that the general foremen assign work to the foremen, responsibly direct their work, evaluate the work of the foremen and their construction crews, grant time off and discipline unit personnel. As such, I find that they are supervisors within the meaning of the Act and exclude them from the unit. The record also shows that the foremen discipline and evaluate unit employees' performance, grant time off and overtime, and exercise independent judgment in the direction of unit personnel. Accordingly, I find that they are also supervisors within the meaning of the Act and exclude them from the unit.

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 4 December 1985

Re: Foster Wheeler Energy Corp.
Metairie, Louisiana
Foster Wheeler Corp.
Energy Plan Constructors, Inc.
Case Nos. 15-CA-9738
22-CA-13975
23-CA-10131

Daniel M. Katz, Esq.
Connerton, Bernstein & Katz
1899 L St., N.W.
Washington, D.C. 20036

Dear Mr. Katz:

Your appeal in the above captioned matter has been fully considered.

The appeal is denied substantially for the reasons set forth in the Regional Directors' letters of 19, 20 and 26 September 1985. It was concluded that the agreement between Laborers' Int'l Union of North America (LIUNA) and Foster Wheeler Energy Corp., (FWEC) was a pre-hire agreement within the meaning of Section 8(f) of the Act. Contrary to the contention on appeal, insufficient evidence was presented

to establish that the agreement ever created a Section 9(a) bargaining relationship between LIUNA and FWEC at the construction project sites in Indiana and/or Ohio. But even assuming that a Section 9(a) relationship existed between LIUNA and FWEC at the Indiana and/or Ohio projects, such a relationship at those locations would not obligate FWEC to provide information under Section 8(a)(5) as to the Mobile Oil Exploration and Production Southwest Inc., (MOEPSI) project outside Mobile, Alabama inasmuch as there was insufficient evidence to establish either that FWEC employed any employee from the Ohio/Indiana projects,or that LIUNA otherwise represented a majority of the employees, at the MOESPI project. Consequently, even assuming, without deciding, that Foster Wheeler Corp. (FWC) and Energy Plant Constructors, Inc., (EPC) are alter egos or single or joint employers with FWEC, none of these entities were obligated to provide the requested information.

Very truly yours,

Rosemary M. Collyer
General Counsel

By: /s/ Mary M. Shanklin
Mary M. Shanklin, Director
Office of Appeals

Case Nos. 15-CA-9738
22-CA-13975
23-CA-10131

cc: Director, Regions 15, 22, 23
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Laborers' Int'l Union of North America, AFL-CIO, 1324 Park Pl. Blvd., Suite 210, Hurst, Texas 76053, Attn: R. P. Vinall, Vice Pres.
Foster Wheeler Corp., 110 South Orange Ave., Livingston, New Jersey 07039, Attn: Mr. Harold Kennedy
Rogers & Wells, 1737 H St., N.W., Washington, D.C. 20006, Attn: Stuart Rothman, Esq.
Foster Wheeler Energy Corp., 2626 North Arnoult, Suite 201, Metairie, Louisiana 70002, Attn: Mr. Orson Zinglersen

In The United States District Court
For The District Of New Jersey

Civil 85-4240

LABORER'S INTERNATIONAL,
Plaintiff,

v.

FOSTER WHEELER,

Defendant.

Transcript of
Proceedings

OPINION

Newark, New Jersey

December 9, 1985

BEFORE:

HONORABLE HAROLD A. ACKERMAN
UNITED STATES DISTRICT JUDGE

Appearances:

This is a dispute between plaintiff Laborers International Union of North America, AFL-CIO [hereinafter "Union"] and defendants Foster Wheeler Corporation [hereinafter "FWC"] and Foster Wheeler Energy Corp. [hereinafter "FWEC"]. Both defendants have brought motions to dismiss for lack of subject matter jurisdiction and failure to join an indispensable party. In the alternative, defendants move the Court to change venue to the Southern District of Alabama. In the event the Court does not dismiss or transfer the action, defendant seeks a stay of proceedings including discovery pending the outcome of a representation election to be held next week at the worksite in Mobile, Alabama. Plaintiff has cross-moved for summary judgment and for an order to compel discovery.

FWEC is the wholly-owned subsidiary of FWC. Plaintiff alleges that Energy Plant Contractors, Inc. ("EPC"), another wholly-owned subsidiary of FWC and the employer of field construction employees on a construction project in Mobile, Alabama (the "MOEPSI" project at Bayou Jonas), is the single employer with or alter ego of FWC and FWEC. Plaintiff thus contends that FWEC has breached a Section 8(f) pre-hire construction industry agreement it had with plaintiff by virtue of EPC's failure to hire employees who are members of or referred by Laborers Local 70 at the MOEPSI project or otherwise comply with the terms of that agreement.

FWEC and the Union are signatories to a contract entitled "National Agreement." Article I of that agreement provides in pertinent part: "This Agreement shall apply on all construction projects within the United States. . .

performed by the Employer or by any person, firm or corporation owned or financially controlled by the Employer." Plaintiff contends that under this provision, this Agreement applies to hiring by EPC as well as FWEC and FWC.

The Agreement also has a broad grievance-arbitration clause, which covers "all grievances and disputes, excluding jurisdictional disputes. . . ." National Agreement, Article XV. Plaintiff seeks arbitration of this dispute under this provision. The Union has alleged certain facts that support its allegation that EPC and FWC are a single employer as follows:

FWC owns 100% of the voting securities of FWEC and EPC. EPC's Board Chairman, Jack H. Kennedy, is also an FWC Vice President and Group Executive, as well as a member of FWC'C Management Council, the body which, according to the FWC Annual Report for 1984, "formulates the basic policies governing the world-wide management of the corporation and meets regularly to review their implementation." Another of the five EPC directors listed in a February 1984 EPC corporate filing was Harold E. Kennedy, FWC's Senior Vice President and General Counsel, and EPC's Treasurer at that time was a certain L. Downey, whose address was listed as the corporate headquarters of both FWC and FWEC in Livingston, New Jersey.

Mobil Oil assumed throughout the process of soliciting, preparing and awarding bids for the Mobile, Alabama natural gas treatment plant project that it was

dealing with FWC and that FWEC would actually perform substantial portions of the work Mobil Oil was entrusting to FWC.

Before signing a contract with EPC, Mobil Oil insisted on an FWC letter of guarantee.

I turn first to the question of whether this court has jurisdiction of this matter. Plaintiff has alleged jurisdiction under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a). Section 301(a) provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act. . . may be brought in any district court of the United States having jurisdiction over the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

Defendant spends innumerable pages explaining why this court does not have jurisdiction to review or make a representation determination. I would agree with defendant that the law is clear that courts lack jurisdiction in a Section 301 suit to resolve questions concerning representation, including the determination of the appropriate bargaining unit and the orde and conduct of elections. See *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976). I find, however, that defendant is attempting to obfuscate the issue here by characterizing plaintiff's action as representational.

The matter at issue here is not whether the plaintiff Union will represent the employees under Section 9 of the NLRA, but the much narrower issue of the applicability of what is known as a Section 8(f) pre-hire agreement.

It is an unfair labor practice for an employer to execute a collective bargaining agreement recognizing a minority union as exclusive bargaining representative of a group of employees prior to initiation of employment, since employees have the right to bargain collectively through representatives of their own choosing. NLRA, Sections 7, 8(a). 29 U.S.C. Sections 157, 158(a). However, in recognition of the unique transitory nature of construction industry employment and the need to have available at each new job site a pool of qualified employees, Congress created an exception to the prohibition against executing agreements with labor organizations in the construction industry not already representing a majority of employees in the appropriate bargaining unit at a future project site.

Section 8(f) of the NLRA, 29 U.S.C. Section 158(f), allows a construction employer to sign a "pre-hire agreement" recognizing a minority union prior to establishment under Section 9 of the Act that the union represents the majority of employees in an appropriate bargaining unit at the project. However, in order to protect the right of employees to choose their collective bargaining representative, if any, a pre-hire agreement can be repudiated by either party at any time prior to the union establishing that it represents a majority of the employees in an appropriate bargaining unit. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *NLEB v. Local Union No. 103,*

International Association of Bridge, Structural & Ornamental Workers (*Higdon*), 434 U.S. 335, 345 (1978). To carry out the purpose of Section 8(f) and national labor policy, such a pre-hire agreement can never be a bar to a representation election brought under Section 9(c) and Section 9(e) of the Act. NLRA Sections 8(f), 9(c), (e), 29 U.S.C. Sections 158(f), 159(c), (e).

As both defendants and the NLRB have contended, the National Agreement can only be characterized as a pre-hire agreement. As the employees of the MOEPSI project have not yet chosen their bargaining representative and the Union makes no claim to majority representation at this point, the National Agreement cannot be considered a collective bargaining agreement under Section 9(a).

Plaintiffs seek a determination of whether EPC is bound by the pre-hire National Agreement, not whether the Union is entitled to Section 9(a) representational status. A construction of the pre-hire agreement does not affect the determination of the NLRB as to the appropriate bargaining unit, as that is a distinct and separate question.

This Court may not allow the Union to use its status under Section 8(f) to impair the right of employees to select their own bargaining agent. See *Higdon*, cited *supra*. The two most recent Supreme Court pronouncements on Section 8(f) delineate the essential difference between the suit plaintiff brings here and the representational dispute defendant's attempt to portray. In *Higdon*, *supra*, the Court found that the union commits an unfair labor practice by picketing to enforce a pre-hire agreement before it has

attained majority status. The court took this view in order to protect two interests that Congress intended to uphold when it enacted Section 8(f).

First, the court wished to protect the Section 7 rights of employees to select their own bargaining representative (See 29 U.S.C. Section 157). "A union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit.... It is thus an unfair practice for an employer under Sections 8(a)(1) and (2) and for a union under Section 8(b)(1)(A) to interfere with, restrain, or coerce employees in the exercise of their right to select their representative" *Higdon* at 344.

Second, the *Higdon* decision sought to promote Congress' "intention that. . . pre-hire agreements were to be arrived at voluntarily. . ." *Higdon* at 348, n. 10. "In accord with this intention, [the court] approved the Board's conclusion that a "pre-hire agreement is voidable" "until and unless [the union] attains majority support in the relevant unit." *Jim McNeff, supra* at 260, quoting *Higdon* at 341.

The *Higdon* court left open the question, however, whether pre-hire agreements are enforceable in and of themselves and not as an attempt to become the bargaining representative in a Section 301 action. In *Jim McNeff, Inc. v. Todd, supra*, the court went on to decide this question. The Court in *McNeff* held that a Section 8(f) agreement is judicially enforceable under Section 301 prior to repudiation even absent proof that the union represented a majority of the employees. The Court stated at page 267:

> "There is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a pre-hire contract."

and on page 260, the Court stated:

> "Unlike the situation in *Higdon*, enforcement of accrued obligations in a Section 301 suit does not mean that the union represents a majority of the employer's employees. In a Section 301 suit, the District Court merely enforces a contract entered into by the employer- a contract that Congress has legitimated to meet a special situation even though employees themselves have no part in its negotiation or execution. Such enforcement does not grant the plaintiff union a right otherwise enjoyed only by a majority union except in the very narrow sense, expressly intended by Congress, that employers and minority unions in the construction industry do not violate the Act by entering into pre-hire agreements."

McNeff at 260. I find this language to be equally applicable to the situation at bar as it was in *McNeff*. A determination of whether EPC is bound by the National Agreement is simply a matter of contract interpretation and does nothing to grant the union majority rights except in the narrow Section 8(f) situation envisioned by Congress.

As in *McNeff*, it would be unjust to allow defendant to reap the benefits of a pre-hire agreement without paying

the bargained for consideration. *McNeff* at 271. If EPC is bound by the agreement via its association with FWEC or FWC, it has bought a certain amount of labor peace and perhaps the use of union hiring halls and stable labor costs in certain parts of the country. As the Supreme Court stated, "having had the music, he must pay the paper." *McNeff* at 271.

While it is certainly still a disputed question of fact whether EPC has had the music here, this is not the juncture of this case to determine the fact.

In considering a motion to dismiss, I must accept as true the factual allegations of the complaint and I may only dismiss the complaint if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cruz v. Beto*, 405 U.S. 319 (1972).

If plaintiff can prove that EPC and FWC are single employers or that they are alter egos, plaintiff's will have stated a claim entitling them to relief.

It is true that:

> "there is no policy of federal labor law, either legislative or judge-made, that a parent corporation is bound by its subsidiary's labor contracts simply because it controls the subsidiary's stock and participates in the subsidiary's management."

American Bell, Inc. v. Federation of Telephone Workers, 736 F2d 879, 887 (3d Cir. 1984), *citing United Paperworkers v. T.P. Property Corp.*, 583 F.2d 33, 35-36 (1st Cir. 1978). Plaintiffs have stated more than a mere parent-subsidiary relationship here. They allege that EPC is FWC's "alter ego." As the Third Circuit stated in *American Bell*, supra:

> "The alter ego theory allows the court to ignore technical differences between two corporations where the second corporation was created merely to avoid the effect of labor laws and does not reflect substantial differences in ownership or management."

American Bell, p. 889, *citing Howard Johnson Co. v. Detroit Local*, 417 U.S. 249, 259 (1974).

In addition to the facts listed earlier detailing FWC's involvement with EPC and the MOESPI project, the EPC-Mobil Oil contract itself states, in identifying EPC as "the CONTRACTOR," that it is "understood that for the purposes of this AGREEMENT, CONTRACTOR shall subcontract major portions of the WORK to its affiliate Foster Wheeler Energy Corporation." And, an internal Mobil Oil memorandum favored defendants over the eventual runner-up in the bidding for the contract on the basis of their experience in such projects (which EPC itself lacks), and recommended "that *Foster Wheeler be awarded the contract for the engineering, procurement, and construction* of the Gas Plant, Administration Building, and North Access Road."

Plaintiff also alleges that Mobil Oil assumed throughout the process of soliciting, preparing and awarding bids for this construction project that it was dealing with FWC and that FWEC would actually perform substantial portions of the work Mobil Oil was entrusting to FWC. Indeed, before signing a contract with EPC, Mobil Oil insisted on an FWC letter of guarantee which provides that "Foster Wheeler Corporation shall be responsible. . . for the true and faithful performance of the said [EPC] Agreement in the [same] manner and to the same extent as if Foster Wheeler Corporation had originally executed said Agreement in place of [EPC]. . . ."

These facts, if proven, indicate that an alter ego relationship may exist.

Should final construction of the contract show that EPC is not an alter-ego, the case is at an end, and it can be dismissed at that time. Plaintiff has, however, alleged sufficient facts to overcome a motion to dismiss at this point.

Defendants also contend that since they have already repudiated any alleged agreement, this court has no jurisdiction. This argument is entirely devoid of merit in light of the *McNeff* case. The defendants in *McNeff* had also already repudiated the agreement and the case concerned the question of what liabilities defendants incurred prior to repudiation. Given the nature of a Section 8(f) agreement and the short term nature of construction projects, it is more likely than not that the construction of an 8(f) agreement will arise in a post-repudiation context. If the parties voluntarily

continue the agreement, and comply with it, there is no reason to bring suit.

This Court, then, has Section 301 jurisdiction over this complaint. Having determined that this Court has jurisdiction under Section 301 to enforce a Section 8(f) pre-hire agreement, the next question raised is whether this dispute is arbitrable. Defendants contend that the NLRB has already ruled on this issue and to order arbitration would violate the NLRB's exclusive power to determine the appropriate bargaining unit.

Once again, defendants confuse representational issues with contract construction issues. The NLRB ruled that the National Agreement was a pre-hire agreement within the meaning of Section 8(f) and that insufficient evidence was presented to establish that the agreement ever created a section 9(a) bargaining relationship between the Union and FWEC. The Board specifically stated that they didn't decide whether FWC and EPC are alter egos or single or joint employers with FWEC.

The Board's opinion discusses the issues raised by the parties solely as they relate to the representational issue under Section 9(a) of the Act. The Board rejected the Union as majority representative because it found that all the Union could show was that it had a pre-hire agreement and had not become the majority representative.

A claim of contract breach will often implicate facts which raise representation issues as well as other issues. The Supreme Court has emphasized that arbitration is to be

an alternative and independent channel to Board resolution in many circumstances. *See Carey v. Westinghouse Electric, Corp.*, 375 U.S. 261 (1964). The *Carey* case discusses the blurred lines that often exist between representational disputes and work assignment disputes. *Id* at 268. As is the case here, they found that labor disputes are often hard to classify.

In spite of the existence of Board jurisdiction in *Carey*, the Court found that arbitration was still desirable.

The Court stated:

> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile, the therapy of arbitration is brought to bear in a complicated and troubled area."

Carey at 272.

The Supreme Court later qualified *Carey* in *South Prairie Construction Co. v. Local 627 Operating Engineer*, 425 U.S. 800 (1976). It is clear from *Operating Engineers* that this broad concurrent jurisdiction of the courts to order arbitration and the NLRB is limited in certain respects. The selection of an appropriate bargaining unit lies within the exclusive jurisdiction of the NLRB and may not be decided by the Court or an arbitrator.

No bar to arbitration exists, however, where the arbitration sought is not concerning an issue which the Board has already ruled on, or is about to rule on, and which is not within the exclusive jurisdiction of the Board.

Here, the Board did not rule on the scope of work provision in the Section 8(f) agreement. A reading on the Board's ruling indicates that they were primarily concerned with who the majority representative should be with respect toto Section 9(a). Any consideration of Section 8(f) was solely from the perspective of whether it had been converted into a binding collective bargaining agreement by majority representation of the Union. I do not find that the Board decided at all whether Section 8(f), viewed solely as a pre-hire agreement, and nothing more, was binding on EPC. From what I can tell from the decisions submitted to me, the Board purposely avoided that issue. Thus, any action taken by the NLRB thus far in this matter does not bar arbitration of this question due to concurrent or exclusive Board jurisdiction.

Where arbitration is not barred for this reason, an employer which has signed an agreement with a union bears a heavy burden in attempting to rebut the strong presumption in favor of arbitrability which Section 301(a) has placed at the core of our national labor policy. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). That presumption requires federal district courts to resolve all doubts in favor of compelling the arbitration of disputed issues under such contracts:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Warrior and Gulf Navigation, Co., *supra*, at 582.

Applying this presumption, a court evaluating a request to compel arbitration of a labor contract dispute must determine, first, whether the reluctant party has shown that it did not enter into a binding agreement to arbitrate, and, secondly, whether the party resisting arbitration has established that the issue which the moving party wishes to arbitrate clearly falls beyond the scope of agreement to arbitrate. *Local 765, Teamsters Union v. Stroehmann Bros. Co.*, 625 F.2d 1092, 1093-94 (3rd Cir. 1980); *Controlled Sanitation Corp. v. District 128, Machinists*, 524 F2d 1324, 1331 (3rd Cirl 1975), *cert. denied*, 424 U.S. 915 (1976).

Article XV of the National Agreement covers "all grievances and disputes, excluding jurisdictional disputes." The parties have thus essentially agreed that during the term of the contract they will submit to the grievance-arbitration machinery virtually any difference between them, except a jurisdictional dispute. Neither defendant contends that a "jurisdictional" dispute lies at the source of the present litigation.

Plaintiff's present "grievance" or "dispute" with defendants is that they have improperly transferred construction work for Mobil Oil Corporation's Mobile, Alabama natural gas treatment plant to EPC, an alter ego of defendants, even though defendants' contract with plaintiff requires such construction work to be performed in accordance with the National Agreement.

By referring this dispute to arbitration, I make no ruling on the merits of plaintiff's claims. As the Third Circuit stated in *Hahnemann University v. District 1199C, National Union of Hospital Employees*, 765 F.2d 38, 41 (3rd Cir. 1985), "The favored status of arbitration derives from Congress' declared policy of promoting industrial peace through the collective bargaining process, rather than through the courts or economic warfare. *See* 29 U.S.C. Section 171, 173(d) (1982). When an employer and union agree to submit their disputes to arbitration as a means of avoiding industrial strife, they agree to submit all disputes, whether or not meritorious. Because processing grievances may be an alternative to disrupting production, "[t]he objection that equity will not order a party to do a useless act is out-weighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 n.6, 46 LRRM 2414 (1960) (quoting Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt.L. Rev. 247, 261 (1958). *Hahnemann University*, *supra*, 765 F.2d at 42.

This dispute, therefore, is arbitrable under Article XV of the National Agreement. This is as far as this Court's inquiry may go at this time.

Should defendants wish to defend plaintiff's claim by contending that the Section 8(f) agreement does not apply to the MOEPSI project, they may present that defense at the arbitration. Defenses to arbitration should be determined along with the underlying dispute at the arbitration. *Chauffeurs, Teamsters and Helpers Local Union No 765 v. Stroemann Bros. Co.*, 765 F.2d 1092, 1093 (3d Cir. 1980).

In addition to claiming that they were never bound by the Agreement, defendants contend that they cannot be forced to arbitrate this issue because, assuming *arguendo* that they were bound by the Agreement, they have already repudiated it. As I have already discussed, the parties are free to repudiate a Section 8(f) pre-hire agreement any time prior to the Union's achieving majority status. As I noted, however, in my discussion concerning Section 301 jurisdiction, even where the agreement has been repudiated, liabilities may have arisen prior to the repudiation. Here, there may be contract damages for failure to honor the agreement in the first place. I am ordering arbitration solely on the question of whether the National Agreement, construed solely as a Section 8(f) pre-hire agreement ever bound EPC to hire Laborers International Union of North America members at the MOEPSI job site. If this question should be answered in the affirmative, it is at that time that the point of repudiation must be determined.

I am not ordering arbitration of the question or whether, and, if so, when defendants repudiated the National Agreement because that issue is premature at this time. In addition, I agree with defendants that that issue may not be arbitrable. Defendants right to repudiate the National Agreement is based on a federal statute, not on a contractual provision. "An arbitration is confined to interpretation and application of the collective bargaining agreement." *United Steelworkers*, *supra*, 363 U.S. at 597. Since the issue of pre-hire agreement repudiation is statutory, rather than contractual, it is properly decided by the court. *See Mesa Verde Construction v. Northern California District Council of Laborers*, 598 F. Supp. 1092 (N.D. Cal. 1984).

I warn the parties not to attempt to confuse the narrow question I have found arbitrable with other issues such as majority representation, bargaining units and repudiation. Before anything else is to be determined in this suit, the threshold issue of whether the Section 8(f) agreement applies must be determined.

Defendants have sought to stay this action until after the representation election has been held. Because the election, as with the Board rulings, is to determine issues other than those I have referred to arbitration, I see no reason to stay anything at this point. I will not stay the representation election. Regardless of the outcome of the election, whether or not defendants were bound by the Section 8(f) agreement prior to its repudiation will still be an important unresolved issue. It is already clear that plaintiffs may not use the arbitration to transform the pre-hire agreement into a binding Collective Bargaining agreement

absent majority support, but that does not mean that defendants can escape past liabilities, should they exist.

The defendants also seek to dismiss plaintiff's claim for failure to join an indispensable party. Federal Rule of Civil Procedure 19 provides the structure for determining whether an action should be dismissed for failure to join an indispensable party. Essentially, it must be determined if the individual is "necessary", if so, whether it is "feasible" to join him, and if not, whether he is "indispensable", i.e., whether in the absence of the necessary party the case should continue or be dismissed. *See generally*, *Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

Defendant contends that although the plaintiff in this action alleges that it has been injured by the loss of contributions by defendants to the fringe benefit trust funds and prays for damages resulting from this injury, the trustees of these funds have not been made parties to this lawsuit. Fed. R. Civ. Pro. 19(a) provides that:

A person is necessary and should be joined as a party if

> "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

A person is feasible to be joined if he is

> "subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action. . .[and if] his joinder would [not] render the venue of the action improper. . ."

Fed. R. Civ. P. 19(b) provides:

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.
>
> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The trustees and their offices are located in Mobile, Alabama, along with the funds which were allegedly sponsored by the Union. The trustees and the funds have no contacts with N.J. and it is highly unlikely that they could be brought into this jurisdiction. Thus the trustees are clearly not feasible parties.

The parties must also be necessary. I see no reason why the trustees are necessary to a determination of whether the defendants and EPC are bound by the National Agreement with respect to the MOEPSI project. If the arbitrator should determine that defendants are not subject to this agreement, the matter is at an end and the trustees have no need to be involved. The trustees are not parties to the Section 8(f) agreement and had no role in negotiating its terms. Their presence in this case would in no way assist the Court in determining who is a party to the labor agreement, nor would it assist an arbitrator in interpreting the agreement's terms.

Should the trustees wish to pursue defendants on their own, they are still free to bring a separate ERISA claim against defendants and EPC. In fact, under ERISA, a claim for payment of contributions to a health and welfare or pension fund is properly brought by the trustees, who have independent jurisdiction for precisely such an action. *See Schneider Moving & Storage Co. v. Robbins*, ___U.S.___, 104 S. Ct. 1844, (1984). *See also Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corporation*, 721 F.2d 451 (3d Cir. 1983); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3rd Cir. 1984).

This action is not solely over fees to Union funds. It is the threshold issue of whether defendants and EPC are bound by the Section 8(f) agreement. Should it be determined that defendants are bound, the action may be transferred at that time if the trustees want to adjudicate fee delinquency in the same action as plaintiff union. The

trustees are simply not necessary parties to the narrow contract interpretation issue presently before the court. As they are not necessary, there is no need to dismiss this suit due to plaintiff's failure to join them.

Defendants also allege that in light of the Board's representation ruling, it is evident that EPC is also an indispensable party. EPC has been determined by the Board to be the employer at the MOEPSI site and thus, any order whose purpose would be to compel hiring of plaintiff's members at MOEPSI, must be biding on EPC.

This theory is only plausible if plaintiff's theory of the case fails. For if plaintiff's allegations here are proven true, there is no need to join EPC because it is one and the same with FWC for purposes of the MOEPSI site. If EPC is not the alter ego of FWC, then plaintiff's complaint fails in its entirety and there is nothing to bind EPC as well as FWC & FWEC.

I therefore deny defendant's motion on that issue as well. Defendants have moved to stay discovery pending arbitration, should the court order arbitration. In support of this motion defendants cite *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Pa 1976), in which the court stayed all discovery pending arbitration. *Levin* concerned a dispute between a patentee and its licensee. The arbitration ordered by the court was pursuant to a clause in the agreement between the two parties providing for arbitration pursuant to the rules of the American Arbitration Association and the Federal Arbitration Act, 9 U.S.C. Sections *Levin* at 880. Other cases staying discovery pending arbitration are also

commercial disputes governed by the *Federal Arbitration* Act., *See*, e.g., *Recognition Equipment, Inc. v. NCR Corp.*, 532 F. Supp. 271 (N.D. Tx. 1981); *Econo-Car INT"L, Inc. v. Antilles Car Rentals*, 61 F.R.D. 8, 10 (D.V.I. 1973), *rev'd on other grounds* 499 F.2d 1391 (3d Cir. 1974).

While caselaw on this issue in the context of a Section 301 suit and labor arbitration is sparse, the only case I have found which directly addresses the issue, holds that discovery should be permitted to the extent necessary for presentation of matters to the arbitrator. In *Int'l Association of Heat and Frost Insulators and Asbestos Workers, Local 66 v. Leona Lee Corp.*, 434 F.2d 192 (5th Cir. 1970), the court found that the district court did not exceed its jurisdiction in ordering the parties to exhaust the arbitration procedures set forth in the collective bargaining agreement and in making available to the parties' federal discovery procedures to the extent necessary for the arbitration determination. The 5th Circuit affirmed the trial court with very little discussion, stating that "such order is consistent with the District Court's retention of jurisdiction and effectuates the policy favoring arbitration." *Leona Lee* at 194.

A later discussion of *Leona Lee* stresses the distinction between cases denying discovery under the Federal Arbitration Act and cases under Section 301 of the LMRA. In *Recognition Equipment*, *supra*, at 275, the court noted of *Leona Lee*:

> "There is nothing in the opinion to indicate that the arbitral forum which would hear the claim in *Leona*

> *Lee* had any discovery powers. Thus, 'dual discovery' may not have been an issue there."

and, the court stated of the commercial dispute before it:

> "Time and again courts have concluded that the purposes of arbitration under the Federal Arbitration Act are to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with ā less costly alternative to litigation."

Id. These same goals cannot be said to be the purpose of labor arbitration under Section 301 of the LMRA.

As noted earlier, arbitration under Section 301 is "a means of avoiding industrial strife,". . ."an alternative to disrupting production," is of "cathartic value," and is a means to avoid "the dangers of excessive judicial intervention." *See Hahnemann University*, *supra*, at 42.

While the speed of resolution of a dispute is certainly a factor, court congestion and cost are not as paramount as they are in other arbitration contexts. Arbitration in the labor context serves as institutional purpose beyond its advantages as a practical alternative to delayed, costly judicial proceedings.

Given these considerations, and the general rule that the trial court has wide discretion in discovery matters. *See Stich v. U.S.*, 730 F.2d 115 (3d Cir. 1984), I find that it is appropriate here to allow discovery on the limited question that is to be arbitrated. To rule otherwise may render the

arbitration meaningless as plaintiff's may be unable to pierce the corporate veil without discovery.

In accordance with this ruling, I grant plaintiff's motion to compel defendants to answer the interrogatories served on them previously in so far as the questions relate to the upcoming arbitration.

Defendants also move for a change of venue. 28 U.S.C. Section 1404(a) provides for a court, in its discretion, to transfer a proceeding "[f]or the convenience of [the] parties and witnesses [and] in the interest of justice . . . to any other district court or division where it might have been brought." This action could have been brought in District Court for the Southern District of Alabama. In *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970), *cert. denied*. 401 U.S. 910 (1971), the Third Circuit outlined the standards to be applied in considering such a motion:

> "It is black letter law that a plaintiff's choice of forum is a paramount consideration in any determination of a transfer request, and that choice. . . should not be lightly disturbed. In accord with that sound doctrine, one district court recently correctly observed: 'the decision to transfer is in the court's discretion, but a transfer is not to be liberally granted.' The burden is on the moving party to establish that a balancing of proper interests weigh in favor of the transfer, and . . . unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail."

Id. at 25.

Defendants point out that the construction project which is the subject of this action is located near Mobile, Alabama; EPC is headquartered in Houston, Texas and maintains a Field Office in Mobile; MOEPSI, the owner of the project has its headquarters in New Orleans; Local 70 of the Union has its office in Mobile, Local 70 and the International have brought a civil contract action over the MOEPSI project in Mobile, Alabama; the trustees for the funds are in Mobile; the FWEC labor relations office is in New Orleans, and the NLRB case took place in Mobile.

In support of their choice of this forum, plaintiffs point out that FWC and FWEC are headquartered in N.J., and many of their key employees are located here. Although EPC is located in Alabama, EPC is 100% owned by FWC. Moreover, EPC's Board Chairman is Jack H. Kennedy, and FWC Vice President and Group Executive based in Livingston, New Jersey, who is also a member of FWC's policy-making Management Council. Defendants thus clearly have means available to them to secure EPC witnesses or documents if they so desire. New Jersey is the site of many of defendant's own records and officials. Plaintiffs contend that defendants seek to stall the present action by arguing that the Court should defer more to the convenience of some of their officials than to the convenience of others.

In balancing these factors, it appears that a multitude of factors exists in favor of each jurisdiction. Which factors one gives weight to depends on which theory of the case one

accepts. If defendant's version of the facts is correct - that they exercise no control over EPC and the MOESPI project with respect to their labor relations, then the Alabama contacts do weigh more heavily in the balance. If, as plaintiff suggests, the Alabama contacts are merely operations controlled out of defendant's New Jersey operations, the New Jersey forum would seem more appropriate.

As this issue will be resolved shortly by the arbitrator, there is no need for me to choose between each sides theory of the case for purposes of venue. As I have granted plaintiff's motion for summary judgment, no witnesses will be inconvenienced until after the arbitrations, and perhaps not even then. As defendants themselves have alleged, "Plaintiff's motion for summary judgment, to the extent it seeks the Court to compel arbitration, involves essentially a legal question. . . ."Plaintiff seeks only an order compelling arbitration at this time, and I have granted this order.

In addition, defendants must show that the balance of convenience of the parties is strongly in favor of transfer. That is not the case if plaintiff's theory of the case is correct. I, therefore deny the motion to transfer venue.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Plaintiff, v. FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION, Defendants.	Civil Action No. 85-4240-HAA

ORDER

Upon consideration of the motion of Defendants Foster Wheeler Corporation and Foster Wheeler Energy Corporation to dismiss for lack of subject matter jurisdiction and failure to join an indispensable party or in the alternative for change of venue or a stay, and of the cross-motion of Plaintiff for summary judgment in its favor, of matters offered in support thereof and in opposition thereto, and of the entire record in this case, Defendants' motions are hereby DENIED and Plaintiff's motion is GRANTED and it is hereby,

ORDERED that Defendants participate in an arbitration of the Plaintiff's grievance concerning the applicability of Section I of the parties' National Agreement to the construction project for Mobil Oil Corporation and its affiliated corporations near Mobile, Alabama, said arbitration to be convened pursuant to Article XV of the parties' National Agreement no later than thirty (30) days after entry of this Order.

/s/ Harold A. Ackerman
UNITED STATES DISTRICT JUDGE

DATE: *Dec. 9, 1985*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AMERICA, AFL-CIO, Plaintiff,	:	Civil No. 85-4240
-vs-	:	TRANSCRIPT OF PROCEEDINGS
FOSTER WHEELER CORPORATION, and FOSTER WHEELER ENERGY CORPORATION, Defendants.	:	Newark, New Jersey January 27, 1986

B E F O R E:
THE HONORABLE HAROLD A. ACKERMAN, USDJ

A p p e a r a n c e s:

DANIEL KATZ, ESQ.,
for the Plaintiff.

APRUZZESE, MC DERMOTT, MASTRO & MURPHY, ESQS.,
BY: VINCENT APRUZZESE, ESQ., and
FRANCIS A. MASTRO, ESQ.
For Foster Wheeler Corporation.

ALBERT B. JEFFERS, ESQ.,
and
STUART ROTHMAN, ESQ.,
For Foster Wheeler Energy Corporation.

THE CLERK: Laborers' Union versus Foster Wheeler.

THE COURT: May we have the appearances, please?

MR. KATZ: For the plaintiff, Daniel M. Katz.

MR. APRUZZESE: For the defendant Foster Wheeler Corporation, Vincent J. Apruzzese. And with me is Frank Mastro of our office, Apruzzese, McDermott, Mastro & Murphy.

MR. ROTHMAN: For Foster Wheeler Energy Corporation, Stuart Rothman. And with me is Albert Jeffers.

THE COURT: Good afternoon, gentlemen.

Before I get to the heart of this matter, I was pleased to learn by letter that the matter of selecting an Arbitrator had been worked out. That was, indeed, gratifying because the record should reflect that the parties were before me on an informal basis in chambers some weeks ago. If I were to guess, I would say three weeks ago.

MR. KATZ: January 7, I believe.

THE COURT: That is almost three weeks ago.

And one of the issues that was brought up there was how and when do we select the Arbitrator? There was free and frank discussion, as the diplomats say.

One of the things done was the scheduling of a meeting in Washington with counsel. Not with the Court, of course. And, apparently, as a result of what was said at our meeting and at your meeting, we've gotten that aspect straightened away.

Now, this is a motion for reconsideration of a prior ruling which I made on December 9th, 1985. And, as the record will reflect, that hearing started late in the afternoon and we didn't get out of here until almost nine o'clock. I may be off by about 20 minutes, but not much.

I read the papers. I'm prepared to decide this matter right now. I have read the papers. I have reacquainted myself with the prior positions of the parties by rereading their briefs, by reading my prior decision and by reading their most recent submissions.

So unless something extraordinary has occurred which would justify another word or two, so to speak, I'm disposed to decide this case right now.

Mr. Katz, do you have anything to say, or do you want to rest on your papers in light of what the Court said?

MR. KATZ: I'm prepared to rest on my papers, your Honor.

THE COURT: Mr. Apruzzese?

MR. APRUZZESE: I'm prepared to rest on my papers as well with just one caveat, your Honor. What I have to say -- what I'd like to say to the Court, if I get the opportunity, does not go to what you're going to decide on the merits of the motion.

THE COURT: Fine.

Mr. Rothman.

MR. ROTHMAN: I'm prepared to rest on our submission. But, again, there have been -- there has been a development that doesn't go directly to your ruling on the motions.

THE COURT: Let me dispose of this. Then we'll deal with these new matters, hopefully.

This case is before me on motions for reconsideration by defendant FWC and FWEC. On December 9, 1985, I ordered that the parties arbitrate the issue of whether their National Agreement, construed solely as an 8(f), Section 8(f) prehire agreement, ever bound EPC

to hire Laborers' International members at the MOEPSI job site. I reserved any decision on the issue of repudiation until after the arbitrator had rendered a decision on the first question. I also ordered limited discovery.

FWEC contends that the Court and not an arbitrator should decide the single employer/alter ego issue. FWEC bases this argument on its allegation that the National Agreement was no longer in existence at the time of the occurrence on which the grievance and request to arbitrate is based.

I've already considered defendants' arguments in my earlier ruling. In order to succeed on a motion to amend an earlier ruling, a losing party must not only establish that the trial judge erred, but "the error must be a manifest misapprehension of the law or mistake of fact." See *Pioneer Paper Stock Company versus Miller Transport Company*, 109 F. Supp. 502 at 504, (D.N.J. 1953).

I have reviewed my earlier rulings, as I said earlier; especially the portions pertinent to this issue at page 70, and I find defendants' arguments as equally unpersuasive as I did the first time.

The question of whether there was a single employer is the first question that must be answered in this litigation. The question of when or if the agreement was repudiated is irrelevant if EPC and FWEC are not single employers or alter egos.

The defendant also seeks to have the Court determine the date of repudiation prior to the arbitration. I find it improper for a federal district court to decide an issue which is not yet required to be decided in order to resolve the case or controversy at hand.

If EPC is determined not to be a single employer or alter ego, the case is over and there is no need for me to reach the repudiation question.

FWEC also contends that arbitration of the single employer/alter ego question is not appropriate in a case such as this where the agreement in question is not a collective bargaining agreement but a Section 8(f) prehire agreement.

I have also considered this argument previously and I've determined that the prehire agreement is as enforceable as a collective bargaining agreement for its own limited purpose.

As the prehire agreement provides for arbitration, the arbitration clause is also enforceable. EPC, FWC and FWEC can always defend at the arbitration by claiming they are not parties to the prehire agreement. Although in *Higdon* the Supreme Court stated that the employer has no "duty to bargain and honor the contract" unless and until the Union attained majority support, *NLRB versus Local No. 103*, 334 U.S. (Higdon), 335 and 345 (1978), the Court was referring to the duty to honor a contract as a collective bargaining contract.

Once again, I reiterate that I do not view the National Agreement as a collective bargaining contract. It is, however, still a valid and defined binding prehire contract. The arbitrator is also doing nothing to interpret the contract other than to determine what parties are bound by it.

FWC contends that it should not be required to arbitrate as only FWEC is a party to the contract.

FWC relies on *American Bell, Incorporated versus Federation of Telephone Workers*, 736 F. 2d 879 (3d Cir. 1984) for the proposition that the Court, itself, must first determine that defendant is a single employer or smaller ego before it can order arbitration of its subsidiary's contract.

The Court in *American Bell* was, however, faced with a different set of circumstances than that present here. No evidence was presented in *American Bell* in support of the single employer/alter ego doctrine other than that the defendants were in a parent-subsidiary relationship.

The Court was also not faced with the issue or whether to issue arbitration or not as an arbitrator had already held hearings on the disputed issues between the parties.

Thus, I do not find that *American Bell* really addresses the issue before me in the instant case.

Defendants also cite *Service Employees Local 47 versus Commercial Property Services*, 755 F. 2d 499 (6th Cir. 1985) as barring this Court from ordering FWC to arbitrate. In that case, Judge Rosenn, sitting by special designation, stated:

"The Court may not order CCM [the parent] to arbitrate absent a finding that CCM and CPS [the subsidiary] are alter egos or that the two constitute a single employer or without otherwise determining that the situation is appropriate for piercing the corporate veil."

This case directly supports what I'm ordering here. Regardless of whether one terms the inquiry the single employer/alter ego issue or something else, the central issue here is whether this situation is appropriate for piercing the corporate veil. I have already determined that it is. As I stated on page 55 of my December 9th ruling, "FWC owns 100 percent of the voting securities of FWEC and EPC. EPC's board Chairman, Jack H. Kennedy, is also an FWC vice-president and Group Executive, as well as a member of FWC's Management Council, the body which, according to the FWC Annual Report for 1984, 'formulates the basic policies governing the worldwide management of the corporation and meets regularly to review their implementation' Another of the five EPC directors listed in a February, 1984 EPC corporate filing was Harold D. Kennedy, FWC's Senior Vice President and General Counsel, and EPC's Treasurer at that time was a certain L. Downey, whose address was listed as the corporate headquarters of both FWC and FWEC in Livingston, New Jersey.

"Mobil Oil assumed throughout the process of soliciting, preparing and awarding bids for the Mobile, Alabama natural gas treatment plant project that it was dealing with FWC and that FWEC would actually perform substantial portions of the work Mobil Oil was entrusting to FWC. Before signing a contract with the EPC, Mobil Oil insisted on an FWC letter of guarantee."

In addition, plaintiff has presented two letters dating from November, 1974 and September, 1985. On November 11th, 1974 FWC assured plaintiff that:

"All labor agreements covering employees engaged in domestic operations have been assigned to Foster Wheeler Energy Corporation, which has agreed to abide by the terms of those agreements and assume all employer obligations thereunder, including that of recognition. No change in Management personnel who have direct contact with Union representatives is contemplated."

On September 10th, 1975 defendants and their bargaining agent, the National Construction Association, presented plaintiff with a simple corporate name change.

Given this evidence, I do not find it at all unfair to require FWC to participate in the arbitration. There is more than ample reason presented to go behind the corporate veil here.

Lastly, FWEC moves for certification of this question to the Third Circuit pursuant to 28 United States Code, Section 1292(b).

In order to find my order appealable under Section 1292(b), I must find (1) that it involves controlling questions of law; (2) that there is substantial ground for a difference of opinion as to the correctness of the order and, (3) that immediate appeal would materially advance determination of the litigation. See 28 U.S.C. Section 1292(b).

As to determination of a "controlling question of law, the Third Circuit has held that the term "encompasses at the very least every order which, if erroneous, would be reversible error on final appeal." See *Katz versus Carte Blanche Corporation*, 496 F. 2d 747 at 755 (3d Cir. en banc) *certiorari denied*, 419 U.S. page 885, (1974).

If my order compelling arbitration is erroneous, the arbitration order would, of course, be reversed on appeal. The litigation of the alter ego/single employer question would, however, continue. The issue would simply be litigated before me instead of an arbitrator.

Thus, immediate appeal would not materially advance termination of the litigation - it would merely transfer the litigation to another forum.

Lastly, I do not find that there is substantial ground for a difference of opinion as to the correctness of my order. While I would not characterize the question of law presented here as well settled, I find the law is clear enough and the equities such to warrant arbitration of the question.

Defendants' motion for 1292(b) certification is accordingly denied.

MR. KATZ, have you submitted an order on this issue?

MR. KATZ: No, your Honor. We haven't.

THE COURT: May I respectfully request that you do so?

MR. KATZ: We will do that promptly, your Honor.

THE COURT: Thank you.

MR. KATZ: Thank you.

THE COURT: Now, Mr. Apruzzese, you indicted that something has occurred which you wish to bring to my attention. What has occurred?

MR. APRUZZESE: Well, your Honor, we have been proceeding in the alternative in this matter, meaning that despite our firm conviction that the matter shouldn't go to arbitration for any number of reasons, we have proceeded in the alternative on the basis that subject to what the Court orders or what the Court may order, we did not want to frustrate the process of moving forward to some definitive conclusion.

Now, as a result, we engaged in the selection of an arbitrator, which you had mentioned.

At the meeting in Mr. Katz' office in Washington following the meeting in your chambers, we went through a procedure and came up with the selection of an arbitrator on the first shot.

The question came up how should we contact the arbitrator to set up a date. We agreed that no contact would be made with the arbitrator unilaterally by either party, anyone ex parte. Indeed, we said: Let us handle it through the auspices of the Federal Mediation people. So, therefore, a letter -- we agreed upon the thrust of a letter to tell Federal Mediation to contact the arbitrator who was selected. A Mr. Kagel.

THE COURT: Kaghel?

MR. APRUZZESE: K-a-g-e-l.

THE COURT: I'm sorry. I misunderstood.

MR. APRUZZESE: K-a-g-e-l.

THE COURT: Oh, Kagel.

MR. APRUZZESE: Sam Kagel.

THE COURT: I'm sorry. I misunderstood you.

MR. APRUZZESE: Accordingly, the Federal Mediation Service was notified that he was the man that we had selected.

THE COURT: Yes, sir.

MR. APRUZZESE: Now, thereafter, on January 21, without any prior consultation with either counsel, Mr. Katz communicated unilaterally with the arbitrator sending to the arbitrator what he conceives to be not only a binding National Agreement, but your opinion that was announced in court and characterizing several other things with regard to the proceeding.

Now, he, of course, favored us with a copy of his letter. However, we consider it entirely inappropriate that he did any such thing. And irrespective of the fact that he's anxious to get on with this matter, we've had other situations where things have been done that we consider to be not only in tune with the rules of court, but have strained the relations in this matter.

We vehemently object to it. He's done it with the NLRB in violation of your order. He had an order signed inadvertently in this matter which you, upon being notified, withdrew.

Now he's unilaterally communicating with the arbitrator. We think it is conduct that is uncalled for and unduly burdens the opportunity to resolve matters in this particular proceeding in an orderly fashion.

THE COURT: Mr. Katz, what is going on here?

MR. KATZ: On January 7th we met in your chambers, your Honor and discussed the process for selecting an arbitrator.

On January 13, Monday, Mr. Apruzzese and Mr. Rothman came to my offices. We exchanged list of five names. Sam Kagel was select. I said, "Why don't we call Mr. Kagel now? We're in the same room. Find out when he's available to do the arbitration and where he'd like to hold it."

Mr. Apruzzese agreed to that procedure. Mr. Rothman, however, said, "No" --

THE COURT: I have to make a call.

(Pause.)

THE COURT: I believe, Mr. Katz, you were addressing the Court.

MR. KATZ: Yes, sir.

And I asked for the case to be brought up to your Honor. It has been previously distributed to counsel for defendants.

I would like to mention that after giving you a summary of the events as they happened, I don't agree

with everything Mr. Apruzzese has said. But let me give you a brief chronology of what happened since the meeting on January 13th, your Honor.

On January 13th we selected the arbitrator, Mr. Kagel. I proposed calling Mr. Kagel. Mr. Apruzzese was agreeable to doing that.

Mr. Rothman objected, saying, "No. We should go through the Federal Mediation and Conciliation Service."

In deference to Mr. Rothman, we agreed to do that. We wrote -- I wrote that day to the Federal Mediation an Conciliation Service giving a paragraph to them we actually sat down and wrote in my conference room about wanting four days in a row, about wanting to have it in either Mobile, Alabama or New Orleans and that kind of business.

After sending that out, as Mr. Apruzzese predicted, came a period -- a director of the FMCS simply wrote to Mr. Kagel saying, "The parties have selected you as the arbitrator. Contact the parties to schedule a hearing."

After that letter -- that was on the 15th. On the 17th -- that was the Friday of the same week -- we had a scheduling conference in this case with Magistrate Perretti.

Magistrate Perretti -- although the defendants had only asked for 60 days' discovery, Magistrate Perretti

set a 90-day discovery cutoff date regarding discovery for the arbitration.

She also ruled in an order which I have not seen but she described to us at the time, that the arbitration was to be conducted within ten days after the discovery cutoff date or as soon thereafter as the arbitrator could accommodate us.

So I suggested to Perry Rosen, who is counsel for FWEC, at the scheduling conference, that: Why don't we call Mr. Kagel on Monday or Tuesday of the next week, the 20th or 21st of last week, jointly. We can schedule a telephone conversation with Mr. Kagel. I can plug the people in from my telephone. We can get the dates and see if he's willing to accept the appointment.

Mr. Rosen said he would get back to me. And he did not call me on Monday. He did not call me on Tuesday.

Tuesday, about 7 p.m., of last week, the 21st, I sent a letter to Mr. Kagel following up on Mr. McMurray's letter to the FMCS Director. I included the same paragraph we had agreed on on January 13th regarding the scheduling. The same exact language. Four days in a row. Mobile or New Orleans.

I also -- in order to tell him when to start the clock running, I had to tell him about Judge Perretti's ruling that the arbitration was going to be no sooner than April 16, which is the discovery cutoff date, and as soon thereafter as

he could accommodate us. I thought it didn't make a lot of sense to start talking about discovery cutoff dates and Magistrate Perretti without saying, by the way, this case involves an order to compel arbitration. That was going to be my Exhibit A in the arbitration, anyhow. So I included the order to compel arbitration that you entered. Just the order -- not the order. The opinion of December 9th.

I included the National Agreement, which is the contract that Mr. Kagel is going to want to see to arbitrate this dispute.

By the way, Mr. Kagel has been an arbitrator for, I believe, some 50 years and is experienced in dealing with these kind of disputes. I think that he can handle it. If the defendants want to point something out, they certainly have an opportunity to do that.

Finally, after receiving my letter, Mr. Kagel telephoned me and he said, "I prefer New Orleans to Mobile."

And I said okay and he said the earliest dates he had in conjunction with those limitations were May 9, 10, 11 and 12 and --

THE COURT: That is the earliest he had?

MR. KATZ: After April 16. April 16 is 90 days from the time Magistrate Perretti set it.

THE COURT: All right.

MR. KATZ: I didn't want to do that. I'm not arguing that she was wrong on that. That is the earliest.

THE COURT: Okay.

MR. KATZ: I think it's a long time, too.

In any event, the consent order which you have apparently received and signed was entered on -- was signed and agreed to on Friday.

I essentially traded to the defendants -- I agreed to withdraw my contempt papers. I agreed to give them a ten-day extension on discovery in return for their agreeing to conduct the arbitration before Mr. Kagel on May 9, 10, 11 and 12 in New Orleans, Louisiana.

I'm sorry if something that I've done has offended Mr. Apruzzese or the other counsel for defendants. Everybody can't always like everything that I do. I don't think there is any impropriety in sending the order compelling arbitration and the National Agreement.

The final thing that I want to say, it has been nine weeks since the Court ordered us to act with alacrity. Entered an order --

THE COURT: And I'm about to say that I'll give Mr. Rothman an opportunity to speak, but I'm really surprised that Magistrate Perretti set down 90 days for discovery.

MR. KATZ: They only asked for 60 days.

THE COURT: I heard you the first time, Mr. Katz.

MR. KATZ: I think Mr. Kagel --

THE COURT: I don't know what to say. This is the first time I learned of this. Because, quite frankly, if I had plugged myself into the situation, it would have been a much shorter period of time.

MR. KATZ: I think Mr. Kagel could accommodate us sooner that than if there is a discovery cutoff.

THE COURT: Let's hear from Mr. Rothman.

MR. KATZ: The last thing I want to say in this whole line of attacks on the ruling of the Court and the actions of myself, I anticipate that there may just be a request to stay the Court's order compelling arbitration.

I've passed to the Court an order in the Chicago Tribune case by a panel in the Seventh Circuit in which the Seventh Circuit, through Judge Posner, indicated that when employers request stays of orders compelling arbitrations that they will rarely, if ever, be heard and that the Seventh Circuit will start imposing sanctions for filing such motions.

THE COURT: What are you afraid of now?

MR. KATZ: I want to put the defendants on notice in court if there is such a motion that I intend to ask for Rule 11 sanctions.

THE COURT: I have enough troubles with the case, Mr. Katz, worrying about decisions that I have to make. If I have to start worrying about decisions that I might have to make, I'll never get out of it.

I don't know if you were here earlier today. We've been going like this since early this morning. We've had a full motion day.

Let me hear from Mr. Rothman. Let's give him a chance to speak.

MR. ROTHMAN: May it please the Court -

THE COURT: Yes, sir.

MR. ROTHMAN: I'm deeply concerned with a number of things. The first one that I want to take up is Mr. Katz' unilateral discussions with the arbitrator. I've participated in one way or another with over -- certainly over 100 occasions. I believe it is improper to discuss anything with an arbitrator unilaterally and no one should talk to a arbitrator until that arbitrator walks through the door of the arbitration room.

What happened in this case was the parties on September 13th agreed that there would be no unilateral

communications with the arbitrator by telephone or otherwise. The communications would be through FWCS.

The letter that Mr. Katz referred to that he prepared contained the provision that it was a mutual submission.

When we learned that Judge Perretti had scheduled hearing dates, I, having returned from Chicago, prepared a form letter to be signed by the three of us and sent it to Mr. Katz, hand delivery, advising the arbitrator of the three -- of the dates of the arbitration and the location. I did that because it was my firm understanding and our firm understanding that there would be no individual submissions. Mr. Katz' letter, at the end, made it appear to the arbitrator that this was joint submission. It stated our thanks in advance.

Now, the difficulty with this situation is that the arbitrator had your decision of December 9th that contained a great deal of discussion and, if I may say so, if I may put it this way, a certain amount if discussion of the issues that the arbitrator will be required to deal with, just as your supplemental decision of today does discuss those things.

The arbitrator had this material before he concluded whether he would accept the appointment. That is one of the very great vices of the situation. The arbitrator did not say: I will take a case. Tell me what it is, send me a copy of the alleged contract in advance.

This letter says that this is the contract of the parties, as though it was binding on FWC.

Now, the arbitrator is going to have this material to peruse without getting our side of the story on all these points, even with respect to those matters where the Court today analyzed some of the relationships of FWC and FWEC. We've not had our opportunity to present our facts at trial.

Now, with respect to -- I don't know how this situation could be undone, if at all, but it is a problem and will continue to be a problem.

Now, Mr. Katz has referred to a case from the Seventh decision --

THE COURT: Seventh Circuit.

MR. ROTHMAN: Seventh Circuit. I'm sorry -- in which they deplore anything that looks like delay in connection with anything that goes to arbitration.

This is not a case in which the defendants are opposed to to the plaintiff having its day in court. We've been saying that after a proper trial and preparation for a trial the Court should determine as one ball of wax the question of repudiation who is bound, damages, if any, and that kind of thing.

So this is not a case for the application of that Seventh Circuit court rule.

I might also add that although the Court denied our 29 motion for certification --

THE COURT: 1292.

MR. ROTHMAN: -- 1292(b) motion for certification, I've always harbored the view and belief there are certain elements in this case that are present and appealable.

Now, with respect to the matter of stay in the event an appeal is taken, I want to defer to Mr. Apruzzese, if I may.

THE COURT: What is happening now, Mr. Apruzzese?

MR. APRUZZESE: Well, your Honor, you have the letter before you that we were referring to and I won't add any further with regard to the contact with the arbitrator. I would only suggest in the future flow of this matter that Mr. Katz refrain from any ex parte unilateral contacts. I think it is entirely inappropriate.

THE COURT: I want to address the parties. I was going to echo what you have just said. I've got to echo that. However, Mr. Katz, with what I believe is an understanding of a feeling of frustration on your part, I think that motivates it. In essence, you've wanted to get the show on the road.

MR. KATZ: Yes, sir.

THE COURT: And your desire to get the show on the road has been motivated by my decision rendered here last December. I sense that sensed that when we all got together. There was a lot of bad feeling expressed at the meeting, either through words or body English.

But the bottom line is this; that when we left that last meeting, arrangements had been made. Mr. Apruzzese had made a suggestion which I thought was an excellent suggestion. It was a pragmatic suggestion. Let's get together, gentlemen, absent the judge. See if we can get this business with the arbitrator done with in terms of the selection and scheduling and try to solve our problems.

There was even a hope expressed by Mr. Apruzzese that possibly the case might be settled. Well, we'll leave that in abeyance for the moment.

The point is that when we left the conference last on January 7th, I entered the hope that some of this heat would be dissipated and that light would be magnified.

I sense now that what has happened after the meeting and after what I appear to -- and, Mr. Katz, you have taken issue with Mr. Apruzzese on this -- that after the parties had agreed to a standard order of procedure with respect to the arbitration and the arbitrator and dealing on a bilateral rather than unilateral basis with him --

MR. KATZ: Yes, sir. I do disagree with that. Mr. Rothman made the same statement.

I didn't agree there would be no unilateral contacts. We simply discussed the nitty gritty issue: How should we schedule this thing?

I said, "Let's call him."

And Mr. Rothman said, "No. Let's go through the FMCS.

I agreed to go through the FMCS.

THE COURT: Can we do this? Can we do this? Because I'd like to have this case arbitrated. I'm sorry. It isn't your fault. It will be arbitrated more quickly because you fitted yourself in with respect to the time frame set by the arbitrator -- by the magistrate.

The only thought I have in this regard to this matter is perhaps -- well, I think -- was thinking about talking to her. In cogitating upon it at this moment, I don't think that would be wise. It might be viewed as an unwelcome intrusion.

Yes, Mr. Mastro. I'm sorry.

MR. MASTRO: Your Honor, excuse me. I was going to try to be of assistance to the Court on this issue since I did attend that conference and my co-counsel did not.

It should be pointed out that Judge Perretti conditioned her order on the fact there would be no further extensions. That is one thing.

Secondly, Mr. Katz indicated he wanted to take the depositions of at least one of our people.

THE COURT: One deposition does not take 90 days.

MR. MASTRO: FWEC has now propounded interrogatories to the plaintiff. We intend to propound interrogatories within the next couple of days. I think there was substantial reason for that time limit and also for, in cognizance of the Court's desire to move this, she said there would be no further extensions of the 90 days.

THE COURT: Mr. Mastro, I appreciate your giving me this intelligence. I really do.

MR. MASTRO: Thank you.

THE COURT: I'm not going to mix in, but I'm going to mix in with counsel by saying to counsel whatever misapprehensions or apprehensions counsel had before concerning the correct way to handle the arbitrator, you got an arbitrator who has been 50 years on the job. I believe I can deduce from that and the fact that the parties [illegible] him that he's got a lot of experience and that he -- the business of arbitration is something that he can handle without any unilateral communications from either side.

I would strongly state because of the filings on each side if, for any reason, you have to approach the arbitrator, do it hand in hand.

Now, that is a very, very clear instruction. That goes for letters, personal contacts, telephonic contacts and the like. That is a very clear instruction.

When you get to that judge -- and he is a judge for the purpose of this reference -- he'll handle it and he'll render a decision. We'll see where we go from there. But, until then, let's end this unilateral or ex parte communication with the arbitrator, Mr. Kagel.

Now, I've rendered my decision, on reconsideration. I've tried to deal fairly and justly with the problem which Mr. Apruzzese presented to me. I have been informed as to what the magistrate has done, as to when the arbitrator is going to hear the matter. I see no other reason to detain you gentlemen here now.

Mr. Apruzzese, I see you rising.

MR. APRUZZESE: A request, your Honor.

THE COURT: Go ahead.

MR. APRUZZESE: Something different than we have already discussed.

Mr. Katz is correct by anticipating -- and I hope your Honor will allow me to explicate why -- anticipating a request of a stay of your order.

Before you answer, your Honor --

THE COURT: I haven't said a word.

MR. APRUZZESE: I know. I want to make sure I can explicate why.

THE COURT: A lot of apprehension here. That's the problem.

MR. APRUZZESE: Here's the reason, Judge.

We feel -- and we recognize you have ruled to the contrary. We feel and my client feels that it is clearly within its rights to seek a finding as to whether or not we're a single employer or an alter ego before we can be told to go to arbitration. Arbitration being consensual, not being a party signatory, that issue should be decided.

If it's your Honor's feeling that by your remarks today you, in effect, have decided that, although I find it difficult to assess those remarks, if you, for example, have already so found, then, of course, it wouldn't be necessary to go to an arbitration. We'd go to repudiation.

On the other hand, if you have not so found, the only issue, as I see it, that would be going to the arbitrator, certainly beyond a reasonable doubt to FWC, is this question of single employer or alter ego.

THE COURT: That's right.

MR. APRUZZESE: Now, with regard to the question of repudiation. I have to emphasizes this because it does seem to me, from everything I've read in District Court decisions, federal courts, Supreme Court, everybody is interested in trying to abbreviate and shorten litigation, if possible, consistent with doing justice to the litigants.

Now, in this particular case -- and this is the reason I'm mentioning this because I think it is pertinent to this request for stay -- we have not asked for delay. Let's make that very clear. The lowest common denominator in our position is not delay. We say the Court should decide the whole thing. The single employer, the repudiation and damages, whatever is left.

Now, on the other hand, our opponents say: Oh, no. Go to arbitration. Therefore, we're not interested in delay.

That's not the point. That is not what the Seventh Circuit was talking about in that case submitted to you. We ask for alacrity but in this forum.

With regard to our request for stay, your Honor, only one other thing. As I understand the documents in this matter, there is absolutely no question that there has been a repudiation of this 8(f) agreement. You can pick a date. Whether it is a June date or a July date, I have done some arithmetic based upon information I have gotten. That arithmetic suggests that there is an outside number beyond which even in a hearing for damages, if that's the measure up to the point of repudiation that this plaintiff cannot go.

Now, that figure is somewhere in excess of approximately $6,000. Now --

THE COURT: I heard that from you on January 7th.

MR. APRUZZESE: Yes. That is what I say to you, your Honor. Our opponent says -- and we were asked by you to see if we could resolve this. Our opponent says: Forget it. As far as we're concerned, we're entitled to every penny a laborer would have earned on that job had you never repudiated the agreement. We want the benefit of our contract, which was all the way to the end of the job.

So what do we have? We have two contending positions of law, it would seem to me. We have two contending positions. If we're correct, it is cut off on repudiation. If we're incorrect, he gets everything to the end of the job. What is left? What is left to talk about?

Now, I submit to you because the measure of damages is one that we can't agree on and Judge Peretti said: Well, you ought to get realistic. We can't agree upon it. What is there to arbitrate? It's a numerical determination based upon people who come on a particular job site and what the rates are as to what the measure is. And consequently I say to you, your Honor, this is a novel case.

First of all, I think that contention, frankly, is fanciful. I think if you read the McNeff decision by the Supreme Court, it clearly indicates that would be fanciful.

There is no purpose in repudiation unless it has the effect of cutting off anything the contract stands for.

So what are we talking about? If we were granted a stay to take an appeal, what are we talking about. Six or $7,000 plus interest he's going to suffer?

What do we have to do as an alternative? We have to truck down to New Orleans and go through a big hearing in New Orleans with whatever evidence is necessary to find out if we have a single employer. To do what? Then come back to your court to take your time to determine repudiation for $6,000? If just doesn't make any sense.

Consequently, your Honor, we urge that you try to decide repudiation.

Secondly, you've already indicated what it is you want to do. I urge upon the Court give us an opportunity, give us an opportunity. Because they're not going to suffer. This is a job site-by-job cite problem. 8(f) contracts are job cite-by-job cite.

With regard to this project, if they have $6,000 at issue, or whatever the number, they're not going to suffer.

THE COURT: Mr. Apruzzese, at the risk of incurring Mr. Katz' sanity, I'm going to answer you.

What, in essence, you have asked for at this hour of the day is a reconsideration of my reconsideration.

I hope -- since I've had the pleasure of having you appear before me on any number of occasions, I hope you won't think that I'm being ornery if I say to you in plain English no.

I have made my decision today. I have stated why I made my decision. I thought I was clear about a half hour or so ago. I still entertain that fantasy. And, in my judgment, in my judgment, since I have laid down, first in December and, again, today, what I perceive to be, as a matter of law and in the interest of justice and fairness the sequence of events, for reasons previously stated at an earlier time today and at another time, I respectfully decline to entertain the motion.

I would ask, Mr. Katz, once again, when you draw the order include that, since I had no anticipation that it was going to be made. But having been presented with the motion, I'm so ruling.

Gentlemen, good afternoon. Thank you very much.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO, Plaintiff, v. FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION, Defendants.	Civil Action No. 85-4240-HAA

ORDER

This matter having come before the Court on Defendants' motions for re-argument pursuant to Rule 12(I) of the Local Rules of this Court and/or amendment of the judgment pursuant to Rule 59(e), Fed. R. Civ. P., Defendant Foster Wheeler Energy Corporation's written request for certification under the provisions of 28 U.S.C. § 1292(b), and Defendant Foster Wheeler Corporation's oral motion for a stay pending appeal, and the Court having considered the memoranda and arguments of counsel and the entire record

in this case; for the reasons outlined in open court on January 27, 1986, Defendants' motions for re-argument and/or amendment of the judgment are hereby DENIED;

the request for certification under the provisions of 28 U.S.C. § 1292(b) is hereby DENIED; and

the motion for a stay pending appeal is hereby DENIED.

Done at Newark, New Jersey, this *29th* day of January, 1986.

/s/ Harold A. Ackerman
UNITED STATES DISTRICT JUDGE
HAROLD A. ACKERMAN

* *All discovery will be stayed until February 13, 1986.*

Harold A. Ackerman

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5079, 86-5080

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

v.

FOSTER WHEELER CORPORATION and
FOSTER WHEELER ENERGY CORPORATION,

Appellants

On Appeal from the United States District Court
for the District of New Jersey (Newark)
(D. C. Civil No. 85-4240)

Argued May 1, 1986

Before: SLOVITER and STAPLETON, Circuit Judges
and MENCER, District Judge*

ORDER

The motion of Appellee Laborers' International Union of North America, AFL-CIO to dismiss the appeal is granted. The Appellee's motion for sanctions is denied. The oral motion of appellants to reconsider the denial of the stay of arbitration is denied.

Attest:

/s/ Sally Mrvos,
Clerk

By the Court,

/s/ Delores K. Sloviter
Circuit Judge

Dated: May 1, 1986

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* Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 85-4240

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Plaintiffs,	:	TRANSCRIPT OF PROCEEDINGS
-vs-	:	Opinion
FOSTER WHEELER, CORPORATION, et al, Defendants.	:	

Newark, New Jersey
October 7, 1987

B E F O R E:
THE HONORABLE HAROLD A. ACKERMAN, USDJ

A p p e a r a n c e s:
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APRUZZESE, McDERMOTT, MASTRO & MURPHY
BY: VINCENT APRUZZESE, ESQ. and
FRANCIS A. MASTRO, ESQ.
Attorneys for Foster Wheeler Corp.

THE COURT: This is an action brought by an international labor union against two corporate entities, Foster Wheeler Corporation (FWC) and one of its wholly owned subsidiaries, Foster Wheeler Energy Corporation (FWEC), seeking damages for violation of a Section 8(f) prehire agreement entered into by the plaintiff union and the subsidiary FWEC. *See*, Section 29 U.S.C. Section 158(f).

The violation is alleged to have occurred as a result of certain events taking place at a construction site near Mobile, Alabama (the "MOEPSI site") run by Energy Plant Contractors (EPC), another wholly-owned subsidiary of FWC. It is a contention of plaintiff's, crucial to this case, that for relevant legal purposes the three corporate entities are one and the same.

Before me now are motions by the two defendant entities, FWC and FWEC, to vacate an underlying arbitration decision and for summary judgment. The summary judgment motions are based on the theory that the Section 8(f) agreement was repudiated before plaintiff was in any way damaged.

Plaintiff has in turn cross-moved for confirmation of the arbitration decision at issue and for a summary judgment that repudiation occurred at a much later

date than defendants contend, or not at all, and that plaintiff has been damaged.

The procedural history of this case is involved. I shall recount it briefly. Initially, plaintiff sought to arbitrate its underlying grievance that there had been a breach of the Section 8(f) agreement as a result of events at the MOEPSI job site.

Defendants refused to arbitrate, and on August 29, 1985, plaintiff filed its complaint in this action. Defendants brought a number of motions for dismissal and alternative relief. In a decision rendered December 9, 1985, I ordered the parties to arbitrate the question whether the Section 8(f) agreement "every bound EPC to higher Laborers International Union of North America members" at the construction site at issue. Transcript of December 9, 1985 Opinion, at Page 70.

I further held that the issue of repudiation would be decided by the court, but only if the arbitrator found in the first place that EPC was bound to the terms of the Section 8(f) agreement at the MOEPSI site. Defendants moved for reconsideration.

In an opinion rendered January 7, 1986, I rejected defendants' arguments for a modification of my December decision, finding *inter alia* that the Third Circuit's decision in *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (3d Cir. 1984) was not inconsistent with my December determination.

On November 10, 1986, Arbitrator Sam Kagel issued an opinion and decision running to 41 pages, finding in part that EPC was bound by the Section 8(f) agreement at the construction site at issue.

Defendants then moved before this court for an order vacating the arbitration decision and granting summary judgment, as earlier described. Defendants withheld briefing on the arbitration issue, however, claiming that a decision on the repudiation issue would end the case.

Plaintiff cross-moved, as earlier described.

On June 8, 1987, the parties appeared before me for oral argument on the summary judgment motions. I reserved decision on those motions pending full briefing of the arbitration issue, and resolved to call the parties back once all the outstanding motions were ready for decision. That time has now arrived.

Before turning to the motions for summary judgment, I shall consider the motions to vacate, and the cross-motion to confirm, the arbitration decision.

Reviewing courts are to uphold awards in labor arbitration proceedings so long as the award in question can be said to "draw its essence from the collective bargaining agreement." *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969) (quoting *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)).

This it does if the award "can in any rational way be derived from the agreement" binding the parties. *Honold*, 405 F.2d at 1128.

Although a number of specified grounds exist for vacating an award, including "manifest disregard" for the agreement, misconduct by the arbitrator, violation of "a specific command of some law - usually the National Labor Relations Act," vagueness, or inconsistency with public policy, Honold, 405 F.2d at 1128 and Note 27, the scope of these grounds is narrow, and the scope of permissible outcomes in arbitration proceedings is broad. *See*, e.g., *Kane Gas Light and Heating v. International Brotherhood of Firemen and Oilers*, 687 F.2d 673 (3d Cir. 1978), *cert. denied*, 460 U.S. 1011, *Graphic Arts International Union v. Haddon Craftsmen*, 796 F.2d 693 (3d Cir. 1968).

I have already discussed the underlying facts in this case in my December 9, 1985 opinion, and I shall not repeat them now. Suffice it to say that in his decision the arbitrator found sufficient connection between EPC, the contractor at the "MOEPSI" site and a wholly-owned subsidiary of FWC, FWC itself, and FWEC, a wholly-owned subsidiary of FWC separate from EPC, to conclude that EPC was bound at the MOEPSI job site by the terms of a "National Agreement" signed by FWEC, which I found on December 9, 1985 constitutes a Section 8(f) prehire agreement.

Specifically, the arbitrator stated that:

"The regard in this case established the following findings:

"That, while the National Agreement was nominally in the name of FWEC, it was both FWEC and FWC that are bound by the National Agreement.

"That when FWEC, as a wholly-owned union operation, filed to even equal if I as a bidder on MOEPSI, FWEC through Ortloff, was able to get onto the MOEPSI job.

"That when FWEC selected FWC's non-union subsidiary, EPC to perform the construction work.

"That EPC was not the true prime contractor on MOEPSI when it was substituted for FWIC.

"That MOEPSI never in fact accepted EPC as the prime contractor, but by its actions, accepted FWC through its guarantee, and FWEC through its control of the bidding and responsibility of directing the project, as the prime contractors.

"That FWEC is the alter ego of FWC.

"That EPC is a single or joint employer with FWEC.

"That FWC and FWEC, as parties to the National Agreement, had the obligation to apply the National Agreement to the laborers' work on MOEPSI.

"That this follows because EPC was a wholly-owned subsidiary of FWC and the National Agreement provides that it applicable to 'any . . . firm or corporation owned or financially controlled by the employer.'

"That this case is not an attack on 'double breasting but the facts in this case are that EPC was not an independent company bidding in competition with other union or non-union companies but was used as a device by FWC and FWEC to obtain all the work on MOEPSI.

"That, in fact, EPC never bid as an independent company on MOEPSI.

"DECISION:

"1. FWC and FWEC violated the National Agreement when they did not apply the National Agreement to the laborers employed by EPC and the MOEPSI job site . . ."

Arbitrator's Opinion and Decision at Pages 34 and 35.

As an issue preliminary to a decision of either defendants' motions to vacate or plaintiff's cross-motion to confirm, I note that the arbitrator took his analysis one step further than I intended him to go when on December 9, 1985 I formulated the issue for arbitral resolution. In my December 9 opinion, I stated that "I am ordering arbitration solely on the question of whether the National Agreement, construed solely as a Section 8(f) prehire agreement ever

bound EPC "to hire plaintiff's members at the MOEPSI site." Transcript of Opinion, at Page 70.

In my order accompanying that opinion, I phrased the arbitrator's charge differently, directing that "defendants participate in an arbitration of the plaintiff's grievance concerning the applicability of Section I of the parties' National Agreement to the construction project for Mobile Oil Corporation and its affiliated corporations near Mobile, Alabama . . ."

The arbitrator and the parties apparently found some tension between my opinion and my order, which the arbitrator resolved by deciding in effect that the issues presented to him included first, the issue of whether EPC was obligated to follow the agreement, and if so, second, whether those obligations were violated. *See*, Arbitrator's Opinion and Decision at Pages 1 and 2 and Page 35.

Of course, this court is responsible for the orders it signs, and for any problems which may result when an order fails to track the findings of an accompanying opinion. Given the diversion in language between my opinion and order, I will not call it unreasonable of the parties or the arbitrator to have been confused as to what I was submitting to the arbitrator, or unreasonable of the arbitrator to resolve the confusion as he did at Pages 1 and 2 of his opinion.

Nevertheless, I shall not defer to that part of the arbitrator's decision regarding breach of the agreement, for two reasons.

First, in my December 9 opinion, I certainly intended to submit to arbitration only the first of the two issues discussed above, namely, whether EPC was bound by the agreement.

Second, I find that the arbitrator could not have decided the breach issue without a decision from me on repudiation.

On December 9, I found that repudiation was an issue for this court to decide. In this case, where defendants argue that repudiation occurred before plaintiff suffered any harm, a decision on the issue of breach must follow, not precede, a decision on when, if ever, the agreement was repudiated. Thus, the issue of breach was not ripe when the arbitrator decided it, and would not have been ripe until this court first took back the case and decided repudiation. For these reasons, the arbitrator's finding of breach must be disregarded.

This does not mean, however, that the balance of the arbitrator's decision must also fall. Aside from his final conclusion regarding breach, the arbitrator's decision falls within the four corners of my intended submission.

Furthermore, the issue of breach is logically distinct from the prior issue of whether EPC was bound, and may be severed from the decision on the prior issue without in any way affecting that decision.

Thus, I shall take, as the decision to review on these motions, the decision by the arbitrator that EPC was

bound by the agreement, and shall cast off as an improper and unnecessary appendage the added decision that the agreement had been breached.

I note that although I have found no cases expressly approving of this selective approach to arbitral review, the defendants have not cited one case which expressly forbids it, and common sense commends it as a fair and efficient way to deal with an arbitral decision that goes just one step further than the court's submission.

Given this narrowing on my part of the arbitrator's decision, I turn to defendants' motions to vacate.

In support of their motions to vacate the arbitrator's decision, the defendants make the following arguments, among others: First, that the arbitrator lacked jurisdiction to enter his decision, because the decision that the three corporate entities were united in accordance with single employer" or "alter-ego" doctrines should have been made by a court, and because the issue of repudiation had to be decided before it could be discerned whether any agreement to arbitrate was still in effect;

Second, that the arbitrator exceeded the scope of his submission by this court, and by the agreement;

Third, that the decision is against public policy;

Fourth, that the arbitrator created new terms to the agreement and modified old terms; and

Fifth, that the arbitration is unlawful because an 8(f) agreement cannot be enforced until the party union has been determined to represent a majority of the job site employees.

Most of these arguments have already been rejected by me in my December 9, 1985 opinion and my January 27, 1986 opinion on defendants' motions for reconsideration. In regard to these arguments, defendants in effect seek a third consideration from me. For this reason, where applicable, and for the reasons stated below, I reject all of defendants' arguments asserted here.

First, I reject the argument that only this court has jurisdiction to apply single-employer and alter-ego doctrines in this case. As I made clear in my January 1986 opinion, there is a sufficient basis under the terms of the "National Agreement" and the underlying facts of this case to leave this matter to the arbitrator.

On January 27, 1986, I found that *American Bell, cited supra*, did not hold to the contrary. Defendant FWC now cites *AT&T Information Systems v. Local 13000 Communications Workers of America*, 797 F.2d 147 (3d Cir. 1986), a more recent Third Circuit opinion in the same case that produced the *American Bell* decision, as support for its argument to the contrary.

AT&T does state expressly that "[t]he existence of a contractual obligation to arbitrate, as distinct from the substantive or procedural provisions of a collective bargaining agreement, is a matter to be resolved by the

courts not the arbitrators." 797 F.2d at 149 (citing *AT&T Technologies, Inc. v. Communications Workers of America*, 106 S.Ct. 1415, 1418 (1986).

Nevertheless, as I found in my December 1985 opinion and as I reiterated on January 27, 1986 in distinguishing *American Bell*, this is not a case where contractual obligations to arbitrate are distinct from the substantive provisions of the agreement.

Article I of the agreement states in part that "[t]his agreement shall apply on all construction projects . . . performed by the employer or by any person, firm or corporation owned or financially controlled by the employer."

Article 15 of the agreement states in part that arbitration shall be employed to resolve "any dispute over the application . . . of this agreement," and that arbitration decisions "shall be within the scope and terms of this agreement."

Given these provisions, and the analysis I followed in December 1985 and January 1986, I remain convinced that the issues of single-employer and alter-ego status are issues within the terms of the agreement and therefore within the jurisdiction of the arbitrator. The issues were properly referred to him.

I also reject the argument that the question of the arbitrator's jurisdiction could not be determined until the repudiation question was determined. On December 9,

1985, I found that even after repudiation, federal courts and arbitrators had jurisdiction to consider questions of pre-repudiation liability under Section 8(f) agreements.

See, Transcript of Opinion, at Pages 64 (court's jurisdiction) and 70 (arbitrator's jurisdiction). *See*, also, the many circuit cases on Section 8(f) enforcement proceedings cited in the parties' briefs, which I shall cite and discuss later in this opinion. Cf. *Nolde Bros., Inc. v. Local No. 358*, 430 U.S. 243 (1977) (duty to arbitrate disputes under a Section 9(a) collective bargaining agreement may survive the agreement).

Second, for reasons discussed previously I reject the argument that by stepping beyond the scope of my submission the arbitrator invalidated his entire decision. Only that severable part of his decision which went beyond the issue I specified for arbitral review shall be disregarded. Nor do I accept the argument that the arbitrator's decision exceeded the scope of review granted to him under the Section 8(f) agreement.

See, my opinions of December 9, 1985 and January 27, 1986, and my decision of defendants' first argument, *supra*, in this opinion.

Third, I reject the argument that the arbitrator's decision violated public policy by imposing upon NLRB jurisdiction or conflicting with NLRB factual findings. First, the arbitrator did not trench on NLRB jurisdiction by making a "single-employer" determination.

In support of its argument for such a public-policy violation, defendant FWEC contends that a single-employer determination is dependent on a decision that the employees of the ostensibly separate employers at issue constitute a single bargaining unit. A decision regarding bargaining units, however, is for the NLRB to make. Thus, FWEC contends, the arbitrator's single-employer determination encroached on the decision-making authority of the NLRB, and controvenes public policy.

FWEC's argument fails because its premise is wrong. As is shown by the very cases FWEC cites in support of its argument, a "single-employer" determination is legally independent of any decision concerning bargaining units.

See, South Praire Construction Co. v. Local 627 (Kiewit), 425 U.S. 800, 804 and 805 (1976); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550 and 551 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); *see*, also, *Local One v. Stearns & Beale, Inc.*, 812 F.2d 763, 769 through 771 (2d Cir. 1987); *Teamsters Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81, 82, 83 (9th Cir. 1982), *cert. denied*, 105 S.Ct. 263 (1984); *Carpenters Local Union v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504 and 505 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

Although each of the aforementioned cases discussed both the single-employer and single-bargaining-unit determinations, they did so because in each of those cases the underlying issue was whether to apply a single Section

9(a) collective bargaining agreement to all entities constituting the single employer at issue.

In this case, however, we are dealing instead with the exceptional circumstance under Section 8(f) of a labor agreement created without predetermined majority reputation. Issues of proper representation, including issues of bargaining-unit boundaries, are premature. Thus, in this case, a single-employer determination need not have been followed by a single-bargaining-unit determination, the arbitrator's single-employer determination did not involve a single-bargaining-unit determination, and there need be no invocation of public policy to protect NLRB jurisdiction over bargaining-unit decisions.

Second, the arbitrator did not reach an alter-ego decision incompatible with earlier NLRB rulings in the underlying dispute here.

In 1985, plaintiff filed charges with three different regional directors of the NLRB alleging separately that FWC, FWEC and EPC had each violated Section 9 of the National Labor Relations Act, 29 U.S.C. Section 9, by failing to provide requested information whose provision was allegedly required under Sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. Sections 158(a)(1) and 158(a)(5). Each of the three regional directors refused to issue a complaint.

In the case of the charge against EPC, the Regional Director for Region 23 refused to issue a complaint for a number of alternative reasons, including the reason that

"While the union alleges that Energy Plant Contructors is an alter ego, a joint employer, a single employer with or a controlled company of Foster Wheeler Energy Corporation, which does have a collective bargaining relationship with the union, the evidence fails to establish that such relationships exist or that Energy Plant Contructors has incurred any obligation to bargain with the union as a result of any relationship it may have with Foster Wheeler Corporation or Foster Wheeler Energy Corporation."

Letter of September 20, 1985, from Louis V. Baldovin, Jr. to Orrin Baird, Esq., at Page 1.

Defendant FWEC cites *Local One v. Stearns & Beale, Inc.*, *cited supra*, as support for the contention that Regional Director Baldovin's letter requires that the arbitrator's alter-ego finding in this case be vacated.

In *Local One*, the Second Circuit held that an arbitration committee's attempt to effectively subject two employers to the terms of a collective bargaining agreement signed by only one of them could not be upheld under the alter-ego doctrine, because the NLRB had already made findings of separateness concerning the two employers which [illegible]istent with an application of the alter-ego [illegible] such findings by the NLRB should weigh "significantly" against any contrary finding by an arbitrator. 812 F.2d at 772.

I find *Local One's* call to weigh NLRB findings "significantly" when faced with contrary arbitral findings to be inapplicable here. In *Local One*, the

underlying NLRB findings of separateness which concerned the circuit court were necessarily made as part of the NLRB's decision that the workers for one of the employers in question were not an "accretion" to the bargaining unit of the other employer. 812 F.2d at 766 and Note 4.

In the case at hand, however, Regional Director Baldovin's findings regarding alter-ego status were wholly unnecessary to his decision, since plaintiff's charge against EPC could have been refuted simply by noting, as Regional Director Baldovin did note in the alternative, that plaintiff had never been certified a majority representative, and that as a result no Section 9(a) collective-bargaining relationship could have existed to give rise to violations of Section 8(a) and 9.

Findings regarding alter-ego status are mere surplusage when the issue before the regional director is whether Section 8(a) and Section 9 collective-bargaining violations have been committed against a non-majority representative. *See*, e.g., the letter of September 19, 1985 from the Director of Region 15 to Orrin Baird, Esq. and the letter of September 26, 1985 from the Director of Region 22 to Orrin Baird, Esq.

Such surplusage cannot nullify a contrary arbitral finding. *See*, generally, Wright, Miller & Cooper, 18 Federal Practice and Procedure Section 4421, on collateral estoppel, and Section 4478, on the "law of the case" doctrine.

For these reasons, the arbitrator's alter-ego determinations do not offend any prior NLRB decision, and public policy does not require that the determinations be vacated. *See*, also, my decision regarding NLRB and arbitral jurisdiction in my December 9, 1985 opinion at Pages 64 through 67.

Fourth, I reject the argument that the arbitrator has added to or modified the terms of the Section 8(f) agreement, based on the view of the parties' agreement which I have now elaborated upon in three opinions, this one included.

Fifth, I reject the argument that the arbitration is unlawful because a Section 8(f) agreement cannot be enforced until the party-union has been declared a majority representative. *See*, my opinion of December 9, 1985, at Page 60, and cases cited therein. *See*, also, Pages 64 and 71 of my December 9 opinion.

Defendants have voiced some additional arguments in support of their motion to vacate, but I find them to be either insubstantial or fully decided by my earlier opinions in this case, and shall therefore refrain from discussing them. Defendants' motions to vacate the arbitrator's decision, having no firm basis in law, are denied.

I now turn to plaintiff's motion to confirm the arbitrator's decision. Given my rejection of defendants' challenges to the decision, I shall confirm it, but only to the extent to which I limited the decision in my earlier

discussion. For all the aforementioned reasons, I confirm the arbitrator's decision, except to the extent that it purports to decide that FWC or FWEC violated the provisions of the Section 8(f) agreement.

I now turn to the parties' motions for summary judgment on the issue of repudiation.

According to Rule 56, summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See*, *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1997).

Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, for which that party will bear the burden of prove at trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 through 2553 (1986).

The moving party bears that initially burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. *Celotex*, 106 S.Ct. at 2553.

Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986)

(quoting Federal Rule of Civil Procedure 56(e)) (emphasis in *Matsushita*).

As I noted in my December 9 opinion, defendants bear the burden of proof on the repudiation issue.

The summary judgment motions before me seek a determination as a matter of law as to when the parties' Section 8(f) agreement was repudiated, if ever. As an initial issue I must deal with the question of whether a recent decision of the NLRB regarding Section 8(f) agreements, *John Deklewa & Sons, Inc.*, 283 NLRB 184 (February 20, 1987), should be applied to any extent in this action.

In my opinion of December 9, 1985, I found that Section 8(f) prehire agreements could be unilaterally repudiated by an employer at any time prior to a determination that the party-union was a majority representative of the affected employees. Plaintiff asserts that I should reverse this position and instead follow the intervening decision of the board of *Deklewa*.

In *Deklewa*, the board decided to prospectively apply a change in Section 8(f) law. This change, as formulated by the board, makes Section 8(f) arguments immune to unilateral repudiation by an employer. According to *Deklewa*, a 38(f) agreement can only be terminated by the operation of its own terms or by a vote by the covered employees to reject or change their representative. *Deklewa*, slip opinion, at 30 through 32, 35, and 42.

Defendants urge me to reject *Deklewa* as authority on the issue of when an employer may repudiate, because, *inter alia*, the U.S. Supreme Court has already ruled contrary to *Deklewa* on this issue and this I am bound by a higher law than that of the NLRB.

I agree with defendants. The Supreme Court decision in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), serves in my judgment to sufficiently establish as a matter of Supreme Court precedent the principle that employers may unilaterally repudiate Section 8(f) agreements short of expiration or election. 461 U.S. at 269 through 272.

I find this to be so despite the fact that the high court expressly reserved decision on the issue of what constitutes repudiation, *see*, 461 U.S. at 270, Note 11 and 271 Note 13, and despite the fact that the board itself found *McNeff* distinguishable from its *Deklewa* holding. *Deklewa*, slip opinion, at Pages 37 through 40.

Given *McNeff*, *Deklewa* represents an untenable diversion from established law by an inferior forum, and shall not be followed by this court. I follow the Third Circuit on this point, and quote from *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979), where the court refused to enforce an NLRB order which intentionally diverged from Third Circuit precedent:

"A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit. Thus, our judgments in *Memorial Hospital* and *St. Vincent's Hospital*

are binding on all inferior courts and litigants in the Third Judicial Circuit, and also on administrative agencies when they deal with matters pertaining thereto.

"We express no personal criticism of an independent federal agency that refuses to accept a judicial determination of this court. We attribute no ulterior motives to the distinguished members of the board who have publicly, although respectfully, expressed disagreement with this court. But the board is not a court nor is it equal to this court in matters of statutory interpretation.

"Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect . . . Congress has not given to the NLRB the pour or authority to disagree, respectfully or otherwise, with decisions of this court. *See*, *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968).

"For the board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced."

608 F.2d at 970 (citing *Marbury v. Madison*, 5 U.S. 137, 177 present 1803)). *See*, *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, Nos. 85-1665 and 85-2074 (9th Cir. June 23, 1987), slip opinion (refusing to follow *Deklewa* because it conflicted with precedent within that circuit).

This same rule applies where, as in this case, Supreme Court precedent binds the NLRB, despite the board's efforts to distinguish it. *See*, *Hutto v. Davis*, 454 U.S. 370 (1982). I shall not abide by the *Deklewa* holding that unilateral repudiation of Section 8(f) agreements is contrary to law.

Given the initial determination to abide by my earlier ruling on Section 8(f) repudiation, I shall precede with the parties' summary judgment motions. The issue before me on both defendants' motions and plaintiff's cross-motion is when, if ever, defendants repudiated the Section 8(f) agreement in this case.

The parties have engaged in extensive discovery, per my previous orders in this case, and have presented me with voluminous factual submissions regarding the knowledge and behavior of, among others, officials of EPC, FWEC, FWC, LIUNA, LIUNA Local 70, and the Building and Construction Trades Council in Mobile, Alabama to which LIUNA Local 70 belonged. Each side argues that the undisputed facts in these submissions allow me to specify, as a matter of law, the time at which the agreement was repudiated, if ever.

To test these arguments, I must first decide as a matter of law how it is that a Section 8(f) agreement is repudiated.

I note at the outset that neither the parties nor I have found any Third Circuit decision on how a Section 8(f) agreement may be repudiated. *See*, *NLRB v. Irwin*, 475

F.2d 1265, 1270 through 1271 (3d Cir. 1973). In *McNeff*, *cited supra*, the Supreme Court expressly reserved on the issue of what "specific events would constitute repudiation, 461 U.S. at 270 Note 11.

In so reserving, however, the court did list a number of possible sufficient events. Specifically, the court stated that: "It is not necessary to decide in this case what specific acts would effect the repudiation of a prehire agreement - sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final proviso in Section 8(f) that shows the union does not enjoy majority support."

461 U.S. at 270 Note 11.

Plaintiff argues that express notice of repudiation by the repudiating party to the nonrepudiating party, either written or oral, should be minimally sufficient to constitute repudiation. I disagree.

I find that repudiation can be effected by even less than express notice. Repudiation can be effected, at the minimum, by activity "completely inconsistent with contractual obligations," which is sufficiently overt to charge the nonrepudiating party with knowledge of the activity. *McNeff*, 461 U.S. at 270, Note 11; *see*, *Carpenters Southern California Administrative Corp. v. J.L.M. Construction Co.*, 124 LRRM 2561, 2563 through 2564 (9th Cir. 1987).

I reach this conclusion for the following reasons. The test for repudiation in general may be said to have two parts: First, the manifestation of an intent by the repudiating party to void or end the agreement, and second, communication of this manifestation to the nonrepudiating party. *See*, 4 Corbin on Contracts Section 973.

The Supreme Court has apparently followed this two-part formulation of the repudiation test in the Section 8(f) context. *See*, *McNeff*, 461 U.S. at 270, discussing petitioner's failure to "have manifested an intention to void . . . the contract," and 461 U.S. at 270, Note 11, discussing possible acts of repudiation, all of which involve communication to the nonrepudiating party. *See*, also, e.g., *J.L.M. Construction Co.*, 124 LRRM at 2563; Contractors, *Laborers, Teamsters and Engineers v. Hroch*, 757 F.2d 184, 189 (8th Cir. 1985).

It would strain language and logic, however, to limit the notion of "manifestation" to a verbal announcement. Acts often speak louder than words, and when acts alone are sufficient to alert a Section 8(f) party that another party intends to terminate the agreement, the test for repudiation shall be met. Acts "completely inconsistent with contractual obligations," *McNeff*, 461 U.S. at 270, Note 11, should be sufficient to manifest such intent. A.

See, *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Harkins Construction Equipment Co., Inc.*, 733 F.2d 1321, 1325 (8th Cir. 1984); *Contractors, Laborers, Teamsters and Engineers v. Hroch*, 757 F.2d 184 (8th Cir. 1985); *United Brotherhood of*

Carpenters v. Endicott, 806 F.2d 918 (9th Cir. 1986); *IBEW Local 441 v. KBR Electric*, 812 F.2d 495 (9th Cir. 1987); *William R. Nash, Inc. v. Local 719*, 124 LRRM 3030 (S.D.Fl. 1985); *Washington Area Carpenters Welfare Fund v. Overhead Door Company*, 681 F.2d 1, 9, Footnote 38 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2085 (1983); *NLRB v. Haberman Construction Company*, 641 F.2d 351 (5th Cir. 1981); *Carpenters Southern California Administrative Corporation v. JLM Construction Company, Inc.*, 124 LRRM 2561 (9th Cir. 1987); *Cable Guide Railing Construction Co. v. International Association of Bridge, Structural and Ornamental Iron Workers*, 543 F.Supp. 405 (W. D. Pa. 1982).

Of course, it would certainly be sufficient under this test to terminate the agreement by supplying express verbal notice of an intent to terminate.

For cases accepting verbal notice as sufficient repudiation *see*, e.g., *Iron Workers Local No. 103 v. Higdon Construction Co., Inc.*, (S.D.Ind. 1982) (Magistrate's Decision), adopted 739 F.2d 280 (7th Cir. 1984); *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355, 357 (5th Cir. 1981); *New Mexico District Council of Carpenters v. Jordan & Nobles Construction Company*, 802 F.2d 1253 (10th Cir. 1986); *Painters Local Union 64 v. Epley*, 764 F.2d 1509 (11th Cir. 1985); *Mesa Verde Construction Company v. Northern California District Council of Laborers*, 598 F.Supp. 1092 (N.D.Cal. 1984), affirmed, Nos. 85-1665 and 85-2074 (9th Cir. June 23, 1987); *Ion Construction Company v. District Council of Painters*, 593

F.Supp. 233 (N.D.Cal. 1984), affirmed, 803 F.2d 1050 (9th Cir. 1986).

Such notice, however, would not be necessary so long as the repudiating party had engaged in overt acts completely inconsistent with contractual obligations.

Given this test, I turn to the factual record at hand. It is undisputed that on June 3, 1985, EPC's president E. O. Self sent to plaintiff's president Angelo Fosco the letter attached to defendant FWEC's briefs as FWEC's Exhibit Y. The copy of this letter offered as FWEC's Exhibit Y is stamped "Received LIU of N.A.," June 6, 1985. This date of receipt of the letter by plaintiff is not in dispute.

The letter stays in part that:

"Without waving or modifying in any respect the position of Energy Plant Constructors, Inc. that Energy Plant Constructors, Inc. is not and has never been a party to any collective bargaining agreement with Laborers' International Union of North America or any of its affiliates, Energy Plant Contructors, Inc. hereby terminates any and all collective bargaining agreements, if any, to which it is a party or to which it is bound by operation of law or otherwise with Laborers' International Union of North America and any and all of its affiliates, including Laborers' Local 70, effective immediately or as soon as permitted by applicable law."

This letter certainly constitutes express notice, and is therefore sufficient repudiation by EPC of any obligations it owed under the agreement, as of June 6, 1985, the data LIUNA received it.

I find, however, on the record of undisputed material facts before me, that there was nothing said or done by EPC, FWEC, FWC, or anyone else earlier in time than June 6, 1985 which as a matter of law constituted repudiation of the Section 8(f) prehire agreement.

Defendants have detailed over and again, in their initial briefs and appendices and repeatedly in later briefs, a long string of events prior to June 6, 1985, beginning in 1978 with the incorporation of EPC, which show that EPC and FWEC were organized as subsidiaries of FWC; that EPC was organized as a nonunion subsidiary and FWEC as a union subsidiary; that officials of LIUNA, LIUNA Local 70, and the Mobile Building and Construction Trades Council all knew that EPC was organized as a nonunion subsidiary of FWC and that FWEC was a union subsidiary of FWC and signatory to the Section 8(f) agreement; that EPC was handling the MOEPSI site construction contract; and that EPC was holding itself out and behaving at the MOEPSI site as a nonunion contractor.

See, e.g., the "Chronology of Repudiation" at Appendix A of defendant FWC's brief in support of motion for summary judgment.

Among all these allegations, the only facts in dispute concern the status of certain LIUNA Local 70 and

Mobile Building and Construction Trades Council officials as agents of plaintiff for purposes related to the Section 8(f) agreement, and whether LIUNA learned as early as May 1984 that EPC, as a nonunion subsidiary of FWC, would be working the MOEPSI site.

See, plaintiff's statement of material facts which are genuinely in issue with respect to defendants' motions for summary judgment; defendant FWEC's statement of material facts genuinely in issue with respect to plaintiff's cross-motion for summary judgment. None of these disputed facts are relevant to my summary judgment analysis, and I ignore them.

The undisputed facts, upon which I shall rely, are put forward by defendants to show that as a matter of law there was repudiation of the Section 8(f) agreement by conduct before June 6, 1985. I find just the opposite; that these facts demonstrate as a matter of law that no repudiation occurred prior to the June 6, 1985 letter. Specifically, these facts fail to show conduct "completely inconsistent with contractual obligations," and thus fail to manifest any intent to repudiate the section 8(f) agreement.

What the facts do show is that EPC and FWEC sustained the position that EPC was simply not a party to the Section 8(f) agreement, see the facts concerning E. O. Self's statements at the November 19, 1984 meeting of the Mobile County Commission and FWEC official "Doc" Zinglersen's telephone statements in early September 1974, which FWC remained silent on the issue. Such a position is not "completely inconsistent with contractual obligations,"

for it is not inconsistent with the terms of a contract for a nonparty to violate those terms. Simply put, one cannot claim to be a nonparty and at the same time repudiate a contract.

Since the facts relevant to this motion show that prior to June 6, 1985 plaintiff never received acknowledgement, in word or deed, even hypothetically, that EPC was a party to the Section 8(f) agreement, nothing done or said before June 6, 1985 can be considered a repudiation of the Section 8(f) agreement.

Of course, the position taken by EPC and FWEC prior to June 1985, that EPC was not bound by the Section 8(f) agreement despite the fact that a signatory to that agreement, FWEC, was a sister subsidiary of FWC, is not an unheard-of position. It is settled in law that the nonunion side of a "double-breasted" operation is not bound by any bargaining-agreement obligations which the union side of the operation might have incurred, so long as the union and nonunion sides remain sufficiently separate as a matter of law in their operations. *See*, e.g., *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550 through 551 (3d Cir. 1983, and cases cited therein.

It is clear from the record that EPC, FWEC and FWC all held out EPC as the nonunion side of a double-breasted operation. See the facts concerning EPC's August 6, 1981 press release, FWEC official "Doc" Zinglersen's telephone statements in early September 1974, and FWC's communications with its shareholders.

Nevertheless, the mere invocation of a double-breasted arrangement, without acknowledgement that the nonunion side might be bound by the Section 8(f) agreement at issue, cannot work a repudiation of the agreement on behalf of the nonunion side, when the law operates to otherwise subject the nonunion side to the terms of the agreement. I find this to be true for two reasons.

First, there is nothing in the case law to support that a nonunion subsidiary can assert its double-breasted status as a means to simultaneously deny being bound by Section 8(f) obligations and repudiate those obligations. Defendants have cited only three Section 8(f) repudiation cases involving double-breasted operations, and I can find no others.

I read one of these cases, *Dee Cee Floor Covering*, 97 LRRM 1072 (NLRB 1977) to involve successor employers rather than a double-breasted operation, and hence irrelevant to this specific inquiry.

Neither of the remaining 2 cases, *Painters Local Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir. 1985) and *International Association of Bridge, Structural & Ornamental Iron Workers Local No. 103 v. Higdon Construction Co.*, 739 F.2d 280 (7th Cir. 1984) ("Higdon II") supports the contention that the assertion of double-breasted status, without more, repudiates a Section 8(f) agreement for a nonunion subsidiary otherwise bound to the agreement.

In *Epley*, repudiation was effected when defendant Epley, the parent of both sides of the double-breasted operation, orally announced to the union "that he was repudiating the prehire agreement" as to the ostensibly nonunion side of the operation. 764 F.2d at 1512.

Epley would therefore be relevant in this case only if FWC had repudiated on behalf of EPC before June 6, 1985. "Higdon II" is vaguer in its holding, but in any event gives no support to the notion that the mere invocation of a double-breasted operation voids agreements otherwise charged to the nonunion side.

In Higdon II, the Seventh Circuit upheld as not clearly erroneous a magistrate's finding that repudiation of a prehire agreement did not occur before January 1, 1974, when before January 1 the nonunion subsidiary was formed but on January 1 or later the nonunion subsidiary entered into a nonunion contract, the subsidiary's general manager told the union that the subsidiary "did not consider itself bound" by the agreement, and the individual who was the parent of the subsidiary "personally" advised the union that he "no longer considered any of his companies bound by the agreement." 739 F.2d at 281 (emphasis added).

The court held that "[w]e agree with the magistrate's conclusion . . . that no repudiation could take place until the union was informed in some manner that the employer no longer intended to be bound by the agreement." 739 F.2d at 282 (emphasis added).

Second, and more importantly, there is positive support in *McNeff* for the position that to repudiate a prehire agreement one cannot avoid an acknowledgement that the agreement binds in the first place. At the Supreme Court stated,

> "However limited the binding effect of a prehire agreement may be, it strains both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained-for consideration. Nothing in the legislative history of Section 8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper."
>
> 461 U.S. at 271.

In the case at hand, the arbitrator's decision holds that EPC, FWC, and FWEC constituted in effect a single entity for all relevant transactions. Therefore, this single entity both won for itself a nonunion construction contract and avoided repudiating an agreement to hire only union members, by protesting in effect that its operation was double-breasted. The entity thus "obtained free" the costly benefits laid out in *McNeff* by claiming it owed no Section 8(f) obligations, rather than admitting that it owed the obligations and was unilaterally terminating them.

McNeff does not tolerate such painless avoidance of contractual duties. Cf. *NLRB v. Al Bryant, Inc.*, 711 F.2d at 553 (when defendant had concealed from the union the fact that it was operating both a union business

and a nonunion business as a single employer, union's failure to bargain on behalf of employees of the nonunion business did not mean union "voluntarily acquiesced" in the exclusion of the nonunion employees from the single-employer bargaining unit).

There is, as defendants have pointed out in their briefs, nothing unlawful about double-breasted operations or the timely unilateral termination of Section 8(f) agreements. In this case, however, defendants improperly used the former as a screen for avoiding the latter. If only belatedly, defendants must "pay the piper."

In reaching this conclusion, I note that defendants' undisputed facts make a substantial showing that, through different channels of information, plaintiff eventually formed the opinion that EPC was a subsidiary of FWC bound by the Section 8(f) agreement which was acting at MOEPSI in a manner completely inconsistent with the agreement. Defendants argue that the formation of this opinion constitutes the acquisition of knowledge or plaintiff's part sufficient to effect the repudiation of the agreement. I disagree.

That plaintiff might have formed such an opinion does not change the fact that prior to June 1985 EPC and FWEC both contended that EPC was not bound by the agreement. Thus, prior to June 1985 no intention to repudiate was manifested, and whatever plaintiff believed, the test for repudiation was not met.

In short, I find that EPC repudiated its Section 8(f) obligations on June 6, 1985. I must next decide whether this act of EPC's was sufficient to constitute repudiation by the two entities being sued here, FWC and FWEC. Given the arbitrator's findings regarding identity among EPC, FWC, and FWEC, I find that EPC's repudiation was sufficient to constitute repudiation for the defendants. *See*, *American Bell*, *cited supra*; Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982); *NLRB v. Al Bryant, Inc.* 711 F.2d 543 (3d Cir. 1983); *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979); *see* also, Morris, the Developing Labor Law, 2d ed. (1983), Volume at Pages 735 through 740 and Supplement (1987) at Pages 265 through 268.

Thus, I find that as a matter of law defendants repudiated the Section 8(f) agreement with LIUNA on June 6, 1985. Plaintiff's cross-motion for summary judgment is to that extent granted, and defendants' motions for summary judgment are denied.

In conclusion, I have confirmed the decision of the arbitrator in substantial part, thus denying defendants' motions to vacate the decision and granting in part plaintiff's cross-motion to confirm the decision. I have found as a matter of law that defendants repudiated the Section 8(f) prehire agreement on June 6, 1985, thus denying defendants' motions for summary judgment and granting in part plaintiff's cross-motion for summary judgment.

At this point in the case, issues of defendants' liability and damage remain to be decided.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 85-4240

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	:	
Plaintiff,	:	O R D E R
v.	:	
FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION	:	
Defendants.	:	

For the reasons stated in the court's opinion in this matter, rendered on October 7, 1987;

It is on this 17th day of November, 1987;

ORDERED:

1. that the motions of defendants to vacate the Award of Arbitrator Sam Kagel are denied, and the cross motion of plaintiff to confirm such Award is granted in part,

but not to the extent that the Award finds that defendants breached the Section 8(f) National Agreement;

2. that the defendants' motions for summary judgment are denied and that plaintiff's cross-motion for summary judgment is granted in part, but only to the extent that I have found that defendants repudiated the Section 8(f) National Agreement on June 6, 1985; and

3. that without prejudice to the right of any party to appeal or otherwise contest any ruling of the court, within a period of sixty (60) days from the date of the court's decision and ending December 7, 1987, the parties shall confer with regard to this issue of damages; and should the parties be unable to resolve that issue, the court shall promptly thereafter, or sooner upon the mutual request of the parties, but in any event at a time subject to the court's calendar, conduct a hearing to determine the appropriate forum and procedure by which said issue may be resolved.

/s/ Harold A. Ackerman
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	:	
Plaintiff,	:	
v.	:	Civil No. 85-4240
FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION	:	(HAA)
	:	ORDER OF JUDGMENT
Defendants.	:	

In consideration of the Court's Order of November 17, 1987 (and its opinion of October 7, 1987 incorporated therein) granting summary judgment on behalf of the plaintiff, and in further consideration of the stipulation of the parties that the damages under the above-referenced Order are $18,500.00, and good cause appearing,

It is on this 26th day of May, 1988,
ORDERED that final judgment be and it hereby is entered

on behalf of the plaintiff in this action in the amount of $18,500.00, without costs to any party.

/s/ Harold A. Ackerman
U.S.D.J.

LAW OFFICES
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5554, 5570 and 5571

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Appellant/Cross Appellee

v.

FOSTER WHEELER CORPORATION,
and FOSTER WHEELER ENERGY CORPORATION,

Appellees/Cross Appellants

Appeal from the United States District Court
For the District of New Jersey
D.C. Civil No. 85-4240

Submitted Under Third Circuit Rule 12(6)
On December 16, 1988

Before: Gibbons, *Chief Judge*,
Hutchinson and Hunter*,
Circuit Judges
Opinion filed February 22, 1989

Judge Hunter participated in the consideration of this appeal but died before the entry of judgment. See 28 U.S.C. § 46(c) (1982).

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OPINION OF THE COURT

PER CURIAM:

1. This case addresses the propriety of a district court's delegation to an arbitrator of the decision whether a

nonsignatory corporation was bound by its subsidiary's national labor agreement. Plaintiff-appellant-cross appellee Laborers' International Union of North America (the "Union") appeals from a judgment entered in the district of New Jersey holding that on June 6, 1985, defendant-appellee-cross appellants Foster Wheeler Corp. ("FWC") and Foster Wheeler Energy Corp. ("FWEC") unilaterally repudiated a collective bargaining agreement with the Union (the "National Agreement"). The Union contends that district court erred because FWC and FWEC could not repudiate a collective bargaining agreement unilaterally, and even if they could, did not do so until August 9, 1985.

2. FWC and FWEC, the defendants in the district court, cross-appeal. FWC contends that the district court erred in compelling arbitration because FWC was not a party to the contract at issue. FWEC contends that the district court erred because unilateral repudiation occurred considerably before June 6, 1985.

I. *FACTS*

3. FWC is an international holding company consisting of various subsidiaries involved in construction. The Union is the bargaining agent for laborers employed by one of FWC's subsidiaries, FWEC. The Union and FWEC are parties to the National Agreement whereby FWEC agrees that most of its work, and the work of FWEC's subsidiaries, will be performed pursuant to the National Agreement. The Union, in return, guarantees that the work will be performed pursuant to the National Agreement regardless of locale. The National Agreement includes a grievance procedure covering "any dispute over the application or interpretation

of this Agreement." The National Agreement expires annually on July 15 of each year and is automatically renewed unless specifically terminated or amended by the parties. FWC is not a signatory to the National Agreement.

4. In 1979, FWC formed another wholly-owned subsidiary, Energy Plant Constructors, Inc. ("EPC"), to operate as a construction contractor on a nonunion basis. FWC is thus a "double-breasted" contractor -- FWEC is its unionized subsidary and EPC is its nonunionized subsidiary. EPC is not a party to this case.

5. In the fall 1984, EPC won a contract from the Mobil Oil Exploration and Production Southeast, Inc. ("MOEPSI"), to construct a natural gas processing plant near Mobile, Alabama. EPC hired its first field construction employee at the MOEPSI site on April 2, 1985, but did not apply FWEC's National Agreement with the Union at the MOEPSI site. The Union, FWC, and FWEC corresponded back and forth about this situation in the spring of 1985. On June 3, 1985, the president of EPC wrote to the Union and said that EPC "is not and never has been party to any collective bargaining agreement" with the Union. The Union received the letter on June 6, 1985. The Union responded by suggesting arbitration as to the applicability of the National Agreement, but FWEC refused. On July 11, 1985, FWEC informed the Union that FWEC had no control over EPC. On August 9, 1985, FWEC notified the Union that it was repudiating the National Agreement to the extent that the National Agreement was allegedly applicable to the MOEPSI project.

6. On August 29, 1985, the Union filed this action under section 301(a) of the Labor-Management Reporting Disclosure Act, 29 U.S.C. § 185(a), seeking an

order compelling FWC and FWEC to arbitrate. The Union also asked for damages in its represenative capacity.

7. FWC moved to dismiss the complaint on the grounds that FWC was not a party to FWEC's National Agreement with the Union and, in any event, that FWC had repudiated the National Agreement. FWEC moved to dismiss the complaint on the grounds that the question presented went to representation and thus was for the National Labor Relations Board. The Union cross-moved for summary judgment.

8. On December 9, 1985, the district court held that FWC was bound to arbitrate because the Union had presented sufficient facts which, *if proven*, would demonstrate an alter ego relationship between EPC and FWC. The district court reserved judgment until after the arbitration on whether the National Agreement had ever been lawfully repudiated. In addition, the district court, over the objections of FWC and FWEC, granted the Union limited discovery on the issue referred to arbitration.

9. FWC and FWEC moved for reconsideration which the district court denied. FWC and FWEC then took an interlocutory appeal to this Court which, we dismissed for lack of appellate jurisdiction. *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, Nos. 86-5079, 80 (3d Cir. May 1, 1986).

10. On November 10, 1986, an arbitrator held that FWC and FWEC had violated the National Agreement. The arbitrator stated first that FWC and FWEC were alter egos and consequently that FWC was bound by FWEC's National Agreement with the Union. Second, he held that FWEC was the true contractor at the MOEPSI site and that EPC was nothing more than a subcontractor. Third, the arbitrator

characterized FWEC and EPC as joint or common employers and thus both bound by the National Agreement.

11. FWC and FWEC moved for summary judgment in the district court, contending that the National Agreement had been repudiated prior to the commencement of work on MOEPSI and that the arbitrator had misinterpreted the National Agreement. The Union cross-moved for enforcement of the arbitrator's award.

12. On October 7, 1987, the district court ruled on all the pending motions and enforced the arbitrator's award with one exception. According to the district court, FWC and FWEC had not repudiated the National Agreement until June 6, 1985, the day the Union received EPC's letter. The district court explicitly rejected the rule enunciated by the NLRB in *John Deklewa & Sons, Inc.*, 283 N.L.R.B. No. 184 (1987), that a prehire agreement cannot be unilaterally repudiated during its term absent an election among bargaining unit employees. The district court held that *Deklewa* was contrary to the Supreme Court's decision in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). Soon afterwards, however, this Court enforced *Deklewa* in *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 109 S. Ct. 222 (1988).

13. On July 1, 1988, the Union timely initiated this appeal. On July 13, and July 15, 1988, FWEC and FWC respectively cross-appealed. We have jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1292.

II. LAW

14. Because this is an appeal from a summary judgment, we must apply in reviewing this case:

> the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources must be viewed in the light most favorable to the party opposing the motion. The nonmovant's allegations must be taken as true, and when these assertions conflict with those of the movant, the former must receive the benefit of the doubt.

Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *see also Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.) (same), *cert. denied*, 474 U.S. 1010 (1985).

15. Before reaching the other issues, this Court must determine whether the district court erred by delegating to an arbitrator the determination whether FWC was FWEC's alter ego and thus a party to FWEC's National Agreement with the Union. EPC is bound by the National Agreement as FWC's subsidiary only if FWC is itself bound by the National Agreement, which applies to "any person, firm or corporation owned or financially controlled by the Employer."

16. The district court in confirming the arbitrator's decision in this case stated that "I remain convinced that the issues of single-employer and alter-ego status are issues within the terms of the agreement and therefore within the jurisdiction of the arbitrator. The issues were properly referred to him."

17. As the law now stands, however, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). From this it follows that "the question of arbitrability - whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T*, 475 U.S. at 649; *Warrior & Gulf*, 363 U.S. at 582-83.

18. Since the "duty to arbitrate has a contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *AT & T*, 475 U.S. at 649 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)(citations omitted)).

19. The requirement for a judicial determination of the obligation to arbitrate may not be circumvented in this case by relying on the parent-subsidiary relationship between FWC and FWEC. This Court has stated that:

> There is no policy of federal law, either legislative or judge made, that a parent corporation is bound by its subsidiary's labor contract simply because it controls the subsidiary's stock and participates in the subsidiary's management.

American Bell Inc. v. Federation of Tel. Workers, 736 F.2d 879, 887 (3d Cir. 1984); *see also AT & T Information Sys. v. Local 13000 Communications Workers of Am.*, 797 F.2d 147, 149 (3d Cir. 1986).

20. The relevant provisions of FWEC's National Agreement with the Union provide that:

> This agreement shall apply on all construction projects . . . performed by the Employer or by any person, firm or corporation owned or financially controlled by the Employer.

Article I, National Agreement, and that arbitration shall be employed to resolve:

> any dispute over the application or interpretation of this Agreement . . . [including] all grievances and disputes, [but] excluding jurisdictional disputes. . .

Article XV, National Agreement.

21. The district court sought to distinguish *American Bell* because in that case "the contractual obligations to arbitrate are distinct from the substantive provisions of the agreement." In effect, the district court held that this case involved the application of Article I, so arbitration was appropriate under Article XV.

22. *American Bell* recognizes, however, that it is the role of the district court, not the arbitrator, to pierce the corporate veil and require a parent corporation to participate in arbitration of a contract to which a subsidiary is formally a party. This Court stated in *American Bell*:

> A *court* may not disregard at will the formal differences between affiliated corporations, and in fact the requirements for corporate veil piercing, although rather imprecise in their various formulations, are demanding ones. This court has stated "the appropriate occasion for disregarding that corporate existence occurs when *the court* must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime. *The court* may only pierce the veil in "specific, unusual circumstances", lest it render the theory of limited liability useless.

American Bell, 736 F.2d at 836 (citation omitted)(emphasis added). *American Bell* fully confirms that the question of whether a parent corporation is bound by its subsidary's labor agreement is to be decided by a district court, not an arbitrator.

23. The district court's opinion is also contrary to Judge Rosenn's opinion in *Service Hosp., Nursing Home & Pub. Employees Union, Local 47 v. Commercial Property Servs.*, 755 F.2d 499 (6th Cir. 1985). Judge Rosenn of this Court, sitting by designation, stated that:

> [T]he court may not order [the parent] to arbitrate absent a finding that [the parent] and [the subsidiary] are alter egos or that the two constitute a single employer or without otherwise determining that the situation is appropriate for piercing the corporate veil.

Id. at 504. The district court misinterpreted *Local No. 47* as requiring the district court to determine whether the claim presented is prima facie "appropriate for piercing the veil," but leaving it to the arbitrator to determine whether the veil should actually be pierced. This reading of *Local No. 47* gives the wrong meaning to the word "appropriate".

III. CONCLUSION

24. The district court erred by letting an arbitrator determine whether FWC was an alter ego of FWEC and hence a party to the National Agreement. That question is for the district court, not an arbitrator. Therefore we will vacate the district court's order of December 9, 1985 compelling arbitration and remand this case to the district court for a determination whether FWC was FWEC's alter ego, and bound by FWEC's National Agreement with the Union. The discovery necessary to make this determination was mandated by the district court's second order of December 9, 1985, and limited to the alter ego issue by the district court's letter order of January 14, 1986. We affirm the discovery granted to resolve whether FWC and FWEC were alter egos. The district court's subsequent orders, predicated on the assumption that FWEC was FWC's alter ego, will be vacated. The district court may reconsider them

in light of our recent decision in *International Ass'n. of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, (3d Cir.), *cert. denied*, 109 S. Ct. 222 (1988), if it finds that FWC and FWEC were alter egos.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5554, 5570 and 5571

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Appellant/Cross Appellee

v.

FOSTER WHEELER CORPORATION
and FOSTER WHEELER ENERGY CORPORATION,

Appellees/Cross Appellants

Appeal from the United States District Court
For the District of New Jersey
D.C. Civil No. 85-4240

Before: Gibbons, Chief Judge, Hutchinson and
Hunter*, Circuit Judges

*Judge Hunter participated in the consideration of this appeal but died before the entry of judgment. See 28 U.S.C. § 46(c) (1982).

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit Rule 12(6) December 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that: 1) the order of the said District Court, entered December 11, 1985, compelling arbitration, be, and the same is hereby vacated and the cause remanded to the said District Court for a determination whether Foster Wheeler Corporation was Foster Wheeler Energy Corporation's alter ego and bound by Foster Wheeler Energy Corporation's National Agreement with the Union; 2) the said District Court's order entered December 11, 1985 and the January 16, 1986 order granting discovery to resolve whether Foster Wheeler Corporation and Foster Wheeler Energy Corporation were alter egos are affirmed; and, 3) the subsequent orders of the said District Court predicated on the assumption that Foster Wheeler Energy Corporation was Foster Wheeler Corporation's alter ego are vacated. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/
Clerk

February 22, 1989

Certified as a true copy and issued in lieu
of a formal mandate on March 29, 1989.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5554 and 88-5570/71

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO
Appellant/Cross-Appellee

v.

FOSTER WHEELER CORPORATION
and FORSTER WHEELER ENERGY
CORPORATION
Appellee/Cross-Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, and HUTCHINSON, Circuit Judge.

The petition for rehearing filed by Appellant/Cross-Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ John Gibbons
Chief Judge

Dated: Mar 21 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Plaintiff, v. FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION, Defendants.	Civil Action No. 85-4240 (Harold A. Ackerman) TRIAL OPINION

On August 29, 1985, plaintiff Laborers International Union of North America, AFL-CIO ("LIUNA") instituted this action under Section 301(a) of the National Labor Relations Act, 29 U.S.C. § 185 (a), against the defendants Foster Wheeler Corporation ("FWC") and its wholly-owned subsidiary, Foster Wheeler Energy Corporation ("FWEC"). LIUNA alleged in its complaint that FWEC, FWC, and Energy Plant Constructors ("EPC"), who was not named as a defendant but is another wholly-owned subsidiary of FWC, were alter egos and, therefore, were bound by the terms of

LIUNA's National Agreement with FWEC. It further contended that the defendants failed to adhere to this agreement during their participation in an engineering and construction project for Mobil Oil Exploration and Production Southeast, Incorporated ("MOEPSI"), a wholly-owned subsidiary of Mobil Oil Corporation. Accordingly, as an initial matter, LIUNA sought compel defendants to submit this dispute to arbitration.

Both defendants promptly moved to dismiss the complaint. FWC claimed it was not a party to the agreement while FWEC argued that the complaint raised an issue of representation over which the National Labor Relations Board (NLRB) had exclusive jurisdiction. LIUNA opposed defendants' motions and cross-moved for summary judgment regarding its request to compel arbitration. Finding that the facts set forth in the complaint, if proven, were sufficient to demonstrate that FWC was the alter ego of FWEC and that LIUNA's claims were contractual, not representational, the court denied the defendants' motions. Turning to LIUNA's motion, the court concluded that the complaint fell within the scope of the agreement's arbitration clause and granted LIUNA's motion. FWC and FWEC's interlocutory appeals were dismissed for lack of jurisdiction.

Pursuant to this court's order, the matter was submitted for arbitration before Arbitrator Sam Kagel. After holding three days of hearings which constituted over 700 pages of transcript and reviewing 192 exhibits, Arbitrator Kagel rendered his decision on November 10, 1986. He found that FWEC and FWC were alter egos and that EPC was a joint or single employer with FWEC. In addition, he

determined that EPC had been listed as the prime contractor on the MOEPSI project only as subterfuge; FWEC was the actual prime contractor. Accordingly, he concluded that both defendants were bound by the terms of the National Agreement and had violated those terms when union members were not hired for the MOEPSI project.

Following Arbitrator Kagel's decision, FWEC and FWC moved to vacate the arbitration award and for summary judgment, arguing that they had repudiated the Agreement before work began on the MOEPSI project. LIUNA cross-moved for summary judgment and confirmation of the arbitration award. While these motions were pending, however, the National Labor Relations Board rendered its decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987) ("*Deklewa*"), which essentially eliminated a signatory's right to repudiate a pre-hire agreement such as National Agreement here. Parties promptly submitted supplemental briefs addressing *Deklewa*'s impact. FWEC and FWC also filed additional motions to vacate the arbitration award, claiming that the arbitrator had exceeded his authority and that his award did not draw its essence from the agreement.

On October 7, 1987, this court rendered its decision. I upheld Arbitrator Kagel's conclusion that the defendants and EPC were bound by the National Agreement but did not defer to his decision that they had breached it. Although I noted that my opinion and order compelling arbitration contained some ambiguities, I found that I had not submitted the issue of breach to the arbitrator for determination. Turning to that issue myself, I determined that EPC had

repudiated the National Agreement on June 3, 1985 and that this repudiation was effective as to the defendants. In reaching this conclusion, I found that this court was not bound by the NLRB's *Deklewa* decision.

FWEC and FWC again appealed, contending that this court's delegation of this matter to arbitration was in error. LIUNA also appealed on the grounds that the defendants could not unilaterally repudiate the National Agreement and, even if they could, they did not do so before August 6, 1985. Before these appeals could be decided, the Third Circuit issued an opinion upholding the National Labor Relations Board's decision in *Deklewa* and approving of its retroactive application. See International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3 v. National Labor Relations Board, 843 F. 2d 770 (3rd Cir.), cert. denied, 488 U.S. 889 (1989) ("*Ironworkers*").[34] The Third Circuit then reversed this court's decision to compel arbitration as well as all subsequent opinions which were based on the arbitrator's decision, stating:

> The district court erred by letting an arbitrator determine whether FWC was an alter ego of FWEC and hence a party to the National Agreement. That question is for the district court, not an arbitrator. Therefore, we will vacate the district court's order of December

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34. *Ironworkers* and *Deklewa* are technically the same case, the former being the appellate decision affirming the latter. However, to avoid confusion over which decision I am discussing at any point, I will refer to them as indicated by separate names.

> 9, 1985 compelling arbitration and remand this case to the district court for a determination whether FWC was FWEC's alter ego, and bound by FWEC's National Agreement with the Union. . . . The district court's subsequent orders [except for one discovery order], predicated on the assumption that FWEC and FWC's alter ego, will be vacated. The district court may reconsider them in light of our recent decision in *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), cert. denied, 488 U.S. 889 (1988).

Laborer's Int'l Union v. Foster Wheeler Corp., 868 F.2d 573 (3rd Cir. 1989).[35]

Following the Third Circuit's decision, this court scheduled this case for a non-jury trial. After two days of testimony, parties agreed to submit this case on the papers for this court's consideration. For purposes of this decision, the defendant's also agreed not to contest plaintiff's claim that they were alter egos. Yet, despite these areas of

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35. This court notes that the Third Circuit later narrowly construed *Foster Wheeler*, 868 F.2d 573, in order to distinguish it from a case that was factually similar to it. See Eichleay Corp. v. Int'l Ass'n of Iron Workers, 944 F.2d 1047 (3rd Cir. 1991), cert. dismissed, 112 S.Ct. 1285 (1992). Of course, this court accepts this distinction.

consensus, three primary areas of disagreement remain.[36] First, parties disagree as to whether the effect of the Third Circuit's conclusion in *Ironworkers* that *Deklewa* should be retroactively applied, is binding on this case. Second, if *Ironworkers* is not directly binding, parties disagree as to how the retroactivity issue should be resolved. Finally, all parties seek reconsideration of the court's determination of the repudiation date--the plaintiff claims it was much later, the defendants, that it was much earlier. A briefing schedule was set which provided parties with the opportunity to address these issues. After several reasonable adjournments, parties submitted their briefs. Therefore, in accordance with Federal Rule of Civil Procedure 52(a), I shall now make findings of fact and conclusions of law.

I. Findings of Fact

Prior to 1974, FWC actively engaged in various commercial activities, including construction work, as a union shop employer. Indeed, as a member of the National Constructors Association, it had entered into a National Agreement with LIUNA in 1973 in which it agreed to

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also differ over the effect of the Third Circuit's opinion. ...ds that various parts of the arbitrator's decision were not appealed and, therefore, were not vacated by the Third Circuit's opinion. The defendants disagree, contending that the arbitrator's decision as well as the subsequent district court decisions (except for a discovery order) were vacated in their entirety. Upon reviewing the Third Circuit's decision, I am persuaded that the defendants' interpretation of the court's remand order is correct. Therefore, this court will review this matter afresh.

recognize and acknowledge LIUNA as the exclusive bargaining representative of all field construction workers, among other obligations.

In 1974, FWC reorganized its commercial operations as part of a long-term expansion plan and became a holding company with approximately forty subsidiaries worldwide. Among the motives for this reorganization, FWC acknowledges that it intended to eventually establish the capability to compete in the open shop market. On November 11, 1974, FWC notified LIUNA that it transferred its domestic engineering, manufacturing, and construction activities to FWEC, its new wholly-owned subsidiary, and, therefore, also assigned to FWEC all labor agreements covering those employees. See Letter to Peter Fosco from P.S. Klick, Jr. (Nov. 11, 1974) ("All labor agreements covering employees engaged in domestic operations have been assigned to Foster Wheeler Energy Corporation, which has agreed to abide by the terms of those agreements and assume all employer obligations thereunder, including that of recognition. No change in Management personnel who have direct contact with Union representatives is contemplated."), Defendants' Exhibit 26 ("D.E. ___"). FWEC was listed as the employer in each subsequent national agreement with LIUNA. In 1978, FWC also formed EPC, another wholly-owned subsidiary, which was designed as and intended to be the open shop counterpart to FWEC.

On April 20, 1982, FWEC and LIUNA entered into the National Agreement at issue here. As indicated by its name, the National Agreement applied by its terms to all

construction projects within the United States except those performed in Oklahoma, Texas and New Mexico which were already covered by a Tri-State Agreement. See National Agreement Art. I ("Scope of Agreement"), Plaintiff's Exhibit 1 ("P.E. ___"). It required FWEC to hire employees through the referral systems of LIUNA's local affiliates, recognize LIUNA as the exclusive bargaining agent for those employees, adhere to certain requirements regarding wages, fringe benefits and overtime and compel its subcontractors to comply with the substantive terms of the agreement. Id. arts. II, V, VII, XI, P.E. 1. Unless the agreement was terminated at least sixty but not more than ninety days prior to the anniversary date of its execution, the agreement was automatically extended for another year. Id. art. XVIII., P.E. 1.

At approximately the same time as FWEC was entering into its new agreement with LIUNA, MOEPSI began the process of selecting a general contractor to oversee the engineering and construction of a sour gas treatment and sulfur recovery facility in Mobile, Alabama. The project consisted of three parts: 1) an offshore platform and natural gas production facility, 2) a pipeline to carry the gas onshore, and 3) an onshore gas processing plant. As the first step in its selection process, MOEPSI sent detailed questionnaires to numerous companies, including FWC. Since it no longer has any engineering or construction capabilities of its own, FWC referred the questionnaire to FWEC. Although FWEC had never engineered or constructed the type of facility MOEPSI specified, it completed the questionnaire and pursued the bid for financial reasons.

Out of seventeen pages containing dozens of questions, only one question on the questionnaire focused on whether or not the contractor was bound by a labor agreement. See MOEPSI Capability Questionnaire at 16 ("6.9 Contractor is to indicate whether its parent organization and its subsidiaries or affiliates are members of the National Contractors Association. In addition, list those companies capable of merit (open) shop operations in specified geographic areas."), D.E. 132. FWEC responded by simply noting the FWC was not a member of the National Contractors Association. It did not indicate that FWC had any open shop subsidiaries.

During 1982 and 1983, MOEPSI reviewed the applications of potential bidders and narrowed down its selection to a "long" list of twenty contractors, including FWEC. Upon receiving a second request from MOEPSI for further information on a wide variety of issues, FWEC indicated on February 15, 1983 that it would utilize union labor to complete the project in accordance with both local and national labor agreements. On August 22, 1983, MOEPSI pared down the "long" list of potential contractors to a "short" list of five who would be asked to submit comprehensive bids. FWEC did not make the "short" list.

In a confidential interoffice memorandum, the MOEPSI project manager explained its bidding strategy, selection process, and recommendations for qualified bidders as follows:

> MOEPSI and the PTF reviewed potential bidders during 1982 and early 1983. The

results were used as a basis for the development of a "long list" of potential bidders (see Attachment I). Some of these contractors were deleted from the list due to lack of comprehensive EPC experience on sour gas plants (e.g., Rust, Peabody, J. Ray McDermott and Brown & Root) or because they would not bid lump sum (e.g. Fluor). Parsons was deleted because they would not bid lump sum unless 1) they were given the bidders list before they bid with the option of declining to bid and 2) they could base their lump sum bid on their own design of the claus plant. The seven remaining contractors [which did not include FWEC] . . . were selected for further evaluation for the final selection of five recommended bidders. . . .

During the period June 21 to 28, 1983, Messrs. W. K. Lucas, A. H. Jorgensen, E. M. Kaftanic and L. S. Rosenblatt visited the first six of the listed contractors at the offices noted and conducted detailed interviews, background and expertise reviews, and personnel, systems and procedures evaluations. Attachment II contains the findings of the interviews. Bechetel is well known to PTF so that visits and detailed interviews were not required.

All these contractors have extensive experience on the various process units and

plant facilities included in the Mary Ann Field onshore facilities. All have sufficient numbers of qualified personnel together with demonstrated capabilities in project management, engineering, procurement, estimating, scheduling and construction.

The location shown are the contractors' recommended home office for the project with their recommended method of field construction. As a result of the contractor evaluation, it is recommended that the following contractors be requested to submit lump sum bids with complete process and mechanical guarantees for the onshore facilities:

Non-Union - Direct Hire
Badger - Cambridge, MA
Fish - Houston, TX
Ortloff - Midland, TX

Non-Union - Subcontractor
Bechtel - Houston, TX
Pritchard - Kansas City

These five contractors have overall experience required for the Mary Ann Field Project. Ortloff built the Pursue plant at Thomasville and Republic's plant at Rankin City, Mississippi. Fish built Shell's plants at Thomasville, Mississippi and Eustace, TX.

> Pritchard, Bechtel, and Badger have extensive experience over many years on all units included in the bid package. Their experience also covers E&P areas and lump sum work with both process and mechanical guarantees. Sterns' and Davy McKee's experience was good but not as complete or extensive as the recommended bidders. Davy McKee could have a problem with their Amoco license of Claus technology. Stearn's management, especially Project Construction Corporation (their open shop construction company), showed a marked inflexibility in field management and procedures.

Memorandum from D.D. Brown to F.D. Musson (Aug. 22, 1983), D.E. 33. As indicated in the above memorandum, the five companies selected as qualified bidders all employed non-union labor. Relying primarily on this characterization of the qualified bidders, the defendants contend that Mobil rejected FWEC because of their union obligations.[37] See

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37. In addition to discerning what he perceived to be Mobil's "signals" regarding the use of union labor on the MOEPSI project, John Sarappo who was general manager of FWEC during the bidding process testified that John Campbell, FWEC's account salesman, told him that Mobil wished to have the project completed by non-union labor. See Tr. 200-202. However, Mr. Sarappo concedes that he never confirmed this fact with Mobil directly.

Mr. Campbell's alleged statement to Mr. Sarappo regarding Mobil's intentions is double hearsay. For this reason, this court will rely on it only to the extent it reflects FWEC's belief about Mobil's aims.

Tr. at 200-201. I disagree. The aforementioned memorandum does not indicate that the union affiliations of any potential bidders played a role in Mobil's decisions. Nor have the defendants been able to point to any other union contractor who was even interested in bidding on the MOEPSI project, much less eliminated from Mobil's "long list." Put simply, there is no evidence beyond the defendants' speculations which indicates that Mobil rejected FWEC because of its union ties.

By early September, FWEC learned that it had not qualified as a bidder but Ortloff had. Prior to MOEPSI project, FWEC and Ortoff had agreed to jointly pursue gas plant projects which would cost over $150 million. Their agreement further specified that they would consider pursuing together those projects costing between $50 and $150 million. However, they had no obligation to jointly pursue any gas plant project costing $50 million or less. The MOEPSI project was estimated to cost under $50 million and, therefore, Ortloff was under no obligation to work with FWEC on preparing a bid. Yet, after initially rejecting a proposal from FWEC to work together, Ortloff determined that it did not want to undertake the risks involved in the MOEPSI project alone. Accordingly, it reversed it prior decision to proceed independently and sought to work jointly with FWEC on the MOEPSI bid. See Trial Transcript ("Tr.") at 182-84 (Jan. 23, 1992) (Testimony of John Sarappo); Deposition of John Sarappo at 25-27 ("Sarappo Dep."), Defendants' Exhibit 105. Although FWEC and Ortloff initially planned to divide the bid between the two of them and seek separate contracts for each, Mobil approved of their proposal for a joint bid on the condition

that a single entity was given overall responsibility for the project. As a result, FWEC agreed to serve as the prime contractor for the project while Ortloff would be responsible for the construction work and certain specialized engineering services. See Tr. at 185-86; Interoffice Memorandum from B.E. Woodings to J.W. Sarappo et al. (Jan. 30 1984), P. Ex. 126; Interoffice Correspondence from D.C. Jenkins to D.M. Anderson (Jan. 30, 1984), P. Ex. 127.

By mid February, 1984, FWEC began preparing to present to Mobil its proposal for a joint bid with Ortloff. Having decided that Mobil wanted to use non-union on the MOEPSI project, FWEC arranged with Ortloff to have FWIC, an international subsidiary of FWC which had no employees in the United States and no union obligations, substitute as the prime contractor. See Interoffice Correspondence from W.R. Campbell to J.W. Sarappo (Feb. 6, 1984), ("It is now clear that Mobil wants to use open-shop labor for the construction of this project. In our meeting we said FW could handle this requirement by bidding as Foster Wheeler Intercontinental Corporation. Our letter(s) and any attachments now and in the future should reflect this.") (emphasis added), P. Ex. 57.[38] As John

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38. Apparently, the Campbell's plan to use FWIC letterhead was difficult to put into practice. Internal memoranda concerning FWIC's prime contractor duties routinely appeared on FWEC letterhead. See Memoranda, P.E. 59, 60(b), 61-66. Furthermore, Sarappo executed a document sent by Mobil to FWIC regarding additional bid conditions in his capacity as vice-president of FWEC. See Letter to FWIC from D.D. Brown (Feb. 29, 1984), P.E. 118.

Sarappo, Vice President of FWEC, explained at trial, this technical change has little practical effect:

> "Well, FWIC was used as a convenience. It was a way of having a single contracting entity for the work to be done. And this single contracting entity then could contract the engineering to Foster Wheeler Energy Corporation and it could subcontract the construction work to Ortloff Corporation.
>
> . . .
>
> I think here we're talking about semantics, because even though it was Foster Wheeler Intercontinental who was the contracting party, the overall project manager for the engineering was Foster Wheeler Engineering Company.

See Tr. at 196; id. at 217 (Q:" The only difference which resulted from FWIC being the nominated contracting party was who got the construction contract?"; A: "Yes, sir.").

On February 8, 1984, John Sarappo, Vice President of FWEC, sent the proposal for a joint bid to Mobil on FWIC letterhead. Although formally acting on behalf of FWIC, Mr. Sarappo stated: "We would propose conducting the project management and engineering of the utility and supporting facilities from Foster Wheeler Energy Corporation's Houston Engineering Center with the engineering of the process units and the construction of all

the facilities being executed by the Ortloff Corporation." Letter from J.W. Sarappo to D.D. Brown (Feb. 8, 1984) at 1 (emphasis added), D. Ex. 140. On March 7, 1984, Mobil agreed to FWIC's proposal for a joint bid. See Letter to D.D. Brown from W. Robert Campbell (Mar. 7, 1984), P. Ex. 119. In a confidential interoffice memorandum, Mobil elaborated on its reasons for accepting the substitution of FWIC for Ortloff, stating:

> . . . . Ortloff proposed to bring Foster Wheeler into the project under [their joint project] Agreement. Ortloff and Foster Wheeler visited our office on February 1, 1984 to present their plan for bidding and executing the work.
>
> Foster Wheeler Intercontinental, an affiliate of Foster Wheeler Energy Corporation, would be the prime contractor, would have project management, procurement, and construction management responsibilities, and would issue all guarantees and warranties. Ortloff would perform the design and engineering for the process facilities and the construction as a subcontractor to Foster Wheeler.
>
> The proposed Foster Wheeler/Ortloff arrangement has the advantages of strengthening Foster Wheeler's process design capability and providing them with a vehicle to perform the construction on an open shop basis. Furthermore, Foster Wheeler's size

> and resources strengthen the project management, project control, procurement, and quality assurance/control functions.

See Interoffice Correspondence to F.D. Musson from D.D. Brown (Feb. 24, 1984) at 1-2 (emphasis added), P. Ex. 87.

Upon Mobil's approval of FWIC (in conjunction with FWEC and Ortloff) as a qualified bidder, the staff of FWEC rather than FWIC began prepared the bid documents. See Tr. at 2076 (Q: "Who had primary responsibility for assembling the various pieces of bid to submit to Mobil?"; A: "My staff in Foster Wheeler Energy Corporation did that."), 209 (Q: "Did any FWIC employees participate in the preparation of the bid?"; A: "From the definition of payroll, no. From the definition of was an officer there, yes."). FWIC did not subsidize the costs of preparing the bid. Id. at 209. Nor does it appear from the record that FWIC would have retained any profits from the project. Id. at 209-10, 214.

Shortly before the bid package was to be submitted, however, Mobil determined that Ortloff did not have the capability to undertake the construction of the project. Id. at 207. As a result, FWEC was under significant time constraints to find another subcontractor. It quickly reviewed three alternative open shop companies: Yeargin, with whom FWEC has worked on a project in Corpus Christi; B.E. & K, an Alabama construction company; and EPC, FWEC's sister construction company. Id. at 207-08; Sarappo Deposition at 59-60. John Sarappo, as Vice President of FWEC, approved the selection of EPC to

replace Ortloff. Tr. at 207-09. The bid package--which by then involved FWIC as the nominal prime contractor with FWEC and EPC as subcontractors--was submitted to Mobil on May 1, 1984. It was signed by W. Robert Campbell, who identified himself as the Area Sales Manager for FWIC. However, Campbell was actually employed by FWEC as an account sales engineer. See Tr. 188-89.

Over the next five months, Mobil negotiated with the five qualified bidders regarding their bid packages and eventually narrowed its selection done to two: the FWIC/FWEC/EPC bid and the Pritchard/Brown & Wood bid. See Smith Deposition at 35-6, D. Ex. 114. By late August, 1984, Mobil appeared to be leaning toward FWIC/FWEC/EPC. In a confidential interoffice memorandum, the MOEPSI project manager explained why:

> Both Foster Wheeler and Pritchard have proposed a high degree of Alabama content at 64% and 68% of their respective contract values. Both contractors will construct the facilities using open shop labor. Foster Wheeler will use its wholly-owned subsidiary, Energy Plant Contractors, Inc., to construct the facilities, and Pritchard will subcontract the construction to Brown & Root of Mobile, Alabama.
>
> . . .
>
> We recommend that Foster Wheeler be awarded the contract for the engineering,

> procurement, and construction of the Gas Plant, Administration Building, and North Access Road. Foster Wheeler does not have any significant exceptions to our pro forma contract. Foster Wheeler's proposal is within the cost and schedule of the pending AFE. Foster Wheeler's proposal is technically acceptable and commercially superior, providing Mobil with the lowest lump sum price.

See Interoffice Correspondence from D.D. Brown to F.D. Musson (Aug. 22, 1984), D. Ex. 49.

In the final days before the bid was to be awarded, Mobil's legal counsel determined that the prime contractor should have an Alabama general contractor's license. Since FWIC did not have the requisite license, Mobil decided it could no longer serve as even the nominal prime contractor. To preserve FWIC/FWEC/EPC's bidding package, Mobil permitted EPC, which had an Alabama general contractor's license, to replace FWIC as the prime contractor on the condition that FWC, the parent company of EPC, FWIC, and FWEC, guarantee EPC's performance. Sarappo Deposition at 78, D. Ex. 105; Smith Deposition at 60-61, D. Ex. 114. FWC executed the requested guarantee which stated in pertinent part:

> . . . Foster Wheeler Corporation as parent of Energy Plant Constructors, Inc. ("EPCI") does hereby guarantee to Mobil Oil Exploration and Producing Scutheast, Inc.

> ("MOEPSI"), its successors and assigns, all the obligations, terms and conditions to be carried out or performed by EPCI under the Articles of Agreement between MOEPSI and EPCI dated October 1, 1984.
>
> . . .
>
> The foregoing guarantee shall be interpreted to mean that Foster Wheeler Corporation shall be responsible to MOEPSI for the true and faithful performance of the said Agreement in the manner and to the same extent as if Foster Wheeler Corporation had originally executed said Agreement in place of EPCI. Should there be any default in the said Agreement on the part of EPCI, then MOEPSI has the right to proceed immediately against Foster Wheeler Corporation without first proceeding against EPCI.

See Letter to MOEPSI from W.C. Reynolds, Jr. (Sept. 25, 1984), P. Ex. 120. With this final obstacle overcome, Mobil awarded the contract to EPC during the last week of September, 1984. The contract was formally executed on October 1, 1984.

The contract's award to EPC--and EPC's open-shop policy--was well publicized during the fall and winter of 1984. See Newspaper Articles, D.E. 73. Furthermore, LIUNA officials made numerous inquiries as to the application of the National Agreement to the MOEPSI

project. In each instance, it appears the defendants informally told the LIUNA officials that EPC was a non-union contractor to whom the National Agreement did not apply. Accordingly, the defendants repeatedly explained, the project would be completed by non-union labor. See, e.g., Deposition of Carroll Daugherty at 109-13, D.E. 111 (Daugherty, a representative of LIUNA, recounting his conversation with Orson "Doc" Zinglersen, the Director of Labor Relations for FWEC); Affidavit of Everett O'Neal Self ¶¶ 7-12 (Self, the President of EPC, describing meeting with labor representatives on November 19, 1984 during which he stated EPC, an open shop employer, had been awarded the MOEPSI contract).

Although LIUNA's local affiliate operated a hiring hall for construction workers,[39] EPC opened its own hiring

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39. At trial, Mr. Terrance Lang, who was the secretary-treasurer of LIUNA's local affiliate, testified regarding the local union's hiring hall and referral system. He explained that applicants signed up for the "out-of-work list" on Monday mornings. Mr. Lang then divided all new applicants into four sub-lists: The A list contained the names of all foreman; the B list contained the names of union members in good standing who sought employment; the C list contained the names of delinquent union members or new members who had not paid their $300 union initiation fee; and the D list contained the names of non-union applicants. The following Thursday morning, Mr. Lang conducted a roll-call by reading each name on the list beginning with list A and proceeding through each sub-list to list D. Those individuals who were not present were crossed off the list. Those who were present were referred to employment until such opportunities were exhausted. At the end of the roll call, a new list was typed up from which those who had not been present or who had been referred to employment for more than

office for the MOEPSI project on January 29, 1985. Since the event had been well-publicized in local papers, EPC received over 5000 applications by the time the office closed three days later. All construction workers employed on the project were hired through this office.

On April 9, 1985, LIUNA sent out a formal grievance letter to the defendants, FWIC, and EPC, indicating that LIUNA considered each of them to be in violation of the National Agreement as a result of their participation in the MOEPSI project. See Letter to FWC, FWEC, FWIC, & EPC from Angelo Posco, General President of LIUNA (Apr. 9, 1985), P.E. 5. On May 3, 1985, Stuart Rothman, counsel for FWEC, responded that FWEC had received LIUNA's letter and would formally address the matters raised. However, in the meantime, he suggested he meet informally with LIUNA representatives to discuss any problems in their relationship. See Letter to Angelo Fosco from Stuart Rothman (May 3, 1985), P.E. 6. Approximately one month later, EPC also answered LIUNA's letter through its president, E.O. Self. It wrote:

> Energy Plant Constructors, Inc. is not a party to any collective bargaining agreement Laborers' International Union of North America or any of its affiliates. . . . .

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three days were deleted. On the next Monday, the process repeated itself. See Tr. at 118-28. Upon reflection, this court finds that the process Mr. Lang described discriminates against non-union members because it favors those on lists B and C over those on list D.

. . .

> Without waiving or modifying in any respect the position of Energy Plant Constructors, Inc. is not and has never been a party to any collective bargaining agreement with Laborers' International Union of North America or any of its affiliates, Energy Plant Constructors, Inc. hereby terminates any and all collective bargaining agreements, if any, to which it is a party or to which it is bound by operation of law or otherwise with Laborers' International Union of North America and any and all of its affiliates, including Laborers' Local 70, effective immediately or as soon as permitted by applicable law.

See Letter to Angelo Fosco from E.O. Self (Jun. 3, 1985).

Within the month following EPC's response to LIUNA, FWEC meet with LIUNA to further discuss LIUNA's grievance. When these meetings failed to resolve the matter, FWEC formally responded to LIUNA's grievance letter by reiterating its previous position:

> FWEC has been a union contractor for at least the last 70 years and maybe to the turn of the century, having given millions upon millions of man-hours of work to members of your International Union and to all the crafts. . . .

. . .

> 4. Since the work in question is presently being undertaken by a company over which FWEC does not have and can exert no control, the LIUNA/FWEC National Agreement is not applicable. There is a different bargaining unit there with a different employer who, as we have very recently been given to understand, is proceeding pursuant to its agreement with the owner. FWEC employees no field construction laborers or mechanics at Mobile. There is nothing FWEC could do to make local labor agreements applicable.

See Letter to Angelo Fosco from Orson Zinglersen (Jul. 11, 1985), P.E. 8; see also Letter to Angelo Fosco from Stuart Rothman (Aug. 2, 1985) (stating again that the National Agreement between FWEC and LIUNA did not apply to the MOEPSI project), P.E. 13.

Less than one month later on August 1, 1985, EPC filed with the National Labor Relations Board a Petition for Election of the union representative for all field construction employees of EPC at the MOEPSI project. A decision on EPC's petition was not reached for several months. In the meantime on August 9, 1985, FWEC formally modified its stance toward LIUNA. Although it still maintained that the National Agreement did not pertain to its activities on the MOEPSI project, FWEC expressly repudiated the Agreement to the extent that the Agreement was found to apply to the

project. See Letter to Angelo Fosco from Stuart Rothman (Aug. 9, 1985), P.E. 14. It explicitly based its right to limit its repudiation to a single site on *Painters Local 64 v. Epley*, 119 LRRM 3305 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), a decision that had just been rendered by the Eleventh Circuit which had jurisdiction over Alabama where the MOEPSI project was located.

Coincidently, on the same day that FWEC notified LIUNA of its limited repudiation, LIUNA filed separate unfair labor practices actions against FWC, FWEC, and EPC. Each action was in turn dismissed by the administrative law judge on the grounds that the National Agreement was a pre-hire agreement pursuant to section 8(f) and LIUNA had not demonstrated that it had ever achieved majority status at the work site. See Letter Opinion of Hugh Frank Malone, NLRB Regional Director, regarding Foster Wheeler Energy Corporation, Case No. 15-CA-9738 (Sept. 19, 1985), D.E. 2; Letter Opinion of Louis V. Baldovin, Jr., NLRB Regional Director, regarding Energy Plant Constructors, Inc., Case No. 23-CA-10131 (Sept. 20, 1985), D.E. 3; Letter Opinion of Arther Eisenberg, NLRB Regional Director, regarding Foster Wheeler Corporation, Case No. 22-CA-13975 (Sept. 26, 1985), D.E. 4. These decisions were jointly considered and affirmed on administrative appeal. See Letter Opinion by Mary M. Shanklin, NLRB Director of Appeals, regarding Case Nos. 15-CA-9738; 22-CA-13975; 23-CA-10131 (Dec. 4, 1985), D.E. 84.

On November 18, 1985, the Regional Director for Region 15 issued a Decision and Direction for Election in response to EPC Petition for Election. Among other

conclusions, he found that: 1) the National Agreement constituted a pre-hire agreement under 8(f); 2) LIUNA had not achieved majority status at the work site; 3) EPC's filing of the Petition for Election repudiated any pre-hire agreement in effect between EPC and LIUNA. Based on these conclusions, the Director ordered an election involving all field construction employees at the MOEPSI project. However, since the election was never held before the project was completed, this proceeding was dismissed as moot on June 1, 1988.

I. Conclusions of Law

Based on these lengthy and detailed findings of fact, I now turn to my conclusions of law. As previously noted, there remain three general legal issues for this court to resolve following the Third Circuit's remand of this case: First, I must determine whether the Third Circuit's decision in *Ironworkers*, 843 F.2d 770 (3rd Cir. 1990), affirming the Board's retroactive application of its new rule in *Deklewa* to all pending administrative cases, is directly applicable here. Second, if *Ironworkers* is not directly applicable, I must then determine whether the *Deklewa* rule should nevertheless be given retroactive effect here in accordance with the criteria set forth in *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971). Assuming the *Deklewa* rule should not be applied retroactively, I must finally determine when, if at all, the defendants repudiated the National Agreement with LIUNA. I shall address each issue in turn.

A. The Applicability of *Ironworkers* to this Case

A pre-hire agreement is a contract between an employer and a union regarding the representation, rights, and responsibilities of a specific group of employees that is executed before any of those employees are actually hired. Generally, such agreements constitute an unfair labor practice because they deny the employees the opportunity to designate via an election their own union representative who would in turn negotiate a binding collective bargaining agreement on the employees' behalf. However, recognizing that the unique characteristics of the construction industry often hamper, if not prevent, union elections and, hence, the development of collective bargaining relationship, Congress had specifically permitted such pre-hire agreements within the construction industry. More specifically, Congress enacted Section 8(f) of the National Labor Relations Act which states in pertinent part:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organizations has not been established under the provisions of section 9 of the Act prior to the making of such agreement . . . Provided . . . That any agreement shall not be a bar to a petition [for

> a representative election] filed pursuant to section 9(c).

29 U.S.C. § 158(f).

Prior to the Board's decision in *Deklewa*, the Board interpreted a pre-hire agreement under section 8(f) as "a preliminary step that contemplates further action for the development of a full bargaining relationship." Ruttmann Construction Co., 191 NLRB 701, 702, (1971); accord R.J. Smith Construction Co., 191 NLRB 693 (1971); enf. denied sub. nom. Operating Engineers Local 150 v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). Consequently, the Board found that pre-hire agreements, without more, could be repudiated by either party, for any reason, and at any time up until the union achieved majority status within the working unit. When the union had achieved majority status within the representative unit covered by the agreement, the agreement was automatically converted into a collective bargaining agreement which was binding on the parties and provided the union with the presumption of majority status even after the agreement's termination.

In *Deklewa*, the Board reexamined this interpretation of pre-hire agreement under section 8(f). In a well-reasoned opinion, the Board concluded this interpretation had serious short-comings. For instance, although each party had a right to repudiate the pre-hire agreement in theory, the intricacies of the conversion doctrine which governed when a union had achieved majority status within a specific work unit rendered the exercise of this right notoriously unreliable in practice. *Deklewa*, 282 N.L.R.B. at 1383-84. Furthermore, the board

found that this interpretation of pre-hire agreements often hampered employee free choice and labor relations stability which were the two primary statutory purposes behind section 8(f) specifically and the National Labor Relations Act generally. Id. at 1283-83. Finally, the Board concluded that its interpretation--particularly as it was reflected in the conversion doctrine--did not accurately reflect section 8(f)'s specific statutory language.

Given these shortcomings, the Board adopted a new rule regarding the interpretation and application of pre-hire agreements. In essence, it held that pre-hire agreements would be binding on all parties until the agreements' expiration or termination via a Board-certified election in which the signatory union is rejected. Therefore, although parties could still convert the pre-hire agreement into a binding collective bargaining one through a Board-certified election, parties lost their right to unilaterally repudiate the agreement during the agreement's duration. Id. at 1385-88.

The *Deklewa* Board conceded that its new rule could be described as a "sharp departure" from its previous interpretation of pre-hire agreements. Id. at 1389. Nevertheless, after balancing the ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles,'" the Board determined that the new rule should be

retroactively applied to all pending administrative cases.[40] Id.

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40. As it explained:

> Application of the Board's new 8(f) principles here and in all pending cases will undoubtedly impose on some parties certain obligations and liabilities they would not have incurred under existing law. At most, however, any additional burden imposed will only be bourn for the duration of the contract involved.
>
> . . .
>
> Countervailing interests justify this additional burden. First, the Board is doing nothing more than holding parties to the terms and conditions of 8(f) contracts that were voluntarily entered into. Second, as extensively discussed above, the need to serve better the fundamental statutory policies of employee free choice and labor relations stability compels our actions here. Finally, if we were to apply the new 8(f) law prospectively only, we would then be required for an indefinite period of time to perpetuate the administrative and litigational difficulties entailed in the application of arcane current law to all pending 8(f) cases.
>
> . . .
>
> In sum, we conclude that the statutory benefits from the announced changes in 8(f) for employees, employers, and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes.

On appeal, the Third Circuit affirmed the Board's new rule. See *Ironworkers*, 843 F.2d 770. With respect to the new rule's retroactive application, the Third Circuit adopted a deferential standard appropriate for reviewing an agency determination. It stated it would adhere to the Board's decision regarding retroactivity absent some manifest injustice. In analyzing the Board's conclusion that the new rule should be applied retroactively, the Third Circuit found that the Board had carefully balanced the ill effects of retroactivity against its benefits and concluded that the overall benefits to employers, employee, and unions outweighed any individual hardships resulting from the change. It did not find any "manifest injustice" with this decision because it concluded that employers relied on the right to repudiate a pre-hire agreement at their own risk. *Deklewa*, the court explained, aptly illustrated its point: According to the stipulated record before the Third Circuit, the employer could not have repudiated the agreement under the old rule because the union had already achieved majority status.

In a footnote, the Third Circuit further concluded that it would have upheld the retroactive application of the Board's new rule under even a less deferential standard. More specifically, the court stated:

> Nor would our result be different if we engaged in an independent analysis under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), or *Chevron v. Hudson*, 404 U.S. 97 (1971). The five factor analysis of *Chenery* is substantively no different than the three factor analysis of *Chevron*. *Chenery*, however, has been

> applied exclusively to administrative agency adjudication, the same context in which this case has arisen . . . . [*Chevron*] on the other hand, appears to have been applied exclusively to judicial adjudications. As noted above, however, on this record an independent analysis under either test would reach the same result here.

Ironworkers, 843 F.2d at 780 n.12 (citation omitted).

Relying primarily on this footnote, LIUNA argues that the Third Circuit extended the retroactive application of the *Deklewa* Board's new rule to all judicial adjudications. Since this case involves a judicial adjudication governed by the standard set forth in *Chevron*, LIUNA therefore contends that Board's new rule must apply here. I disagree. The specific language of the footnote clearly delineates the limits of the Third Circuit's conclusion. It stated: "[O]n this record an independent analysis under [*Chevron*] would reach the same result here." Id. (emphasis added). In other words, the Third Circuit was not extending the scope of its holding to include all judicial adjudications. Instead, the court was simply noting that its decision to apply the *Deklewa* rule retroactively would also pass muster under *Chevron* in light of *Deklewa*'s particular facts.

By restricting its conclusion to the facts of the *Deklewa* case, the Third Circuit was implicitly acknowledging that the *Chevron* analysis involves a balancing process which must be completed on a case-by-case basis. See *Chevron*, 404 U.S. at 106-07 ("it must be stressed that 'we must . . . weigh the merits and demerits in

each case by looking to the prior history of the rule in question, it purpose and effect, and whether the retroactive application will further or retard its operation.'") (emphasis added). Accordingly, the court was also implicitly acknowledging that its conclusion regarding the retroactivity of a new rule to the *Deklewa* facts would not necessarily determine whether or not the new rule should be retroactively applied to a different case. See, e.g., Gruber v. Price Waterhouse, 911 F.2d 960, 964-65 (3rd Cir. 1990) (although court had previously held that a new rule regarding the statute of limitations for securities fraud should be applied retroactively in four previous cases, it concluded that the facts of the case before it prohibited the new rule's retroactive application there); Gatto v. Meridian Medical Assoc., Inc., 881 F.2d 840, 843 (3rd Cir. 1989) (retroactive application of new rule in one case does not necessarily require retroactive application of new rule in another), cert. denied, 493 U.S. 1080 (1990); see also Juzwin v. Asbestos Corp., 900 F.2d 686, 692 (3rd Cir. 1990) ("[M]odern jurisprudence recognizes no set principle of retroactivity. Instead, modern decisions reflect a balancing approach which recognizes that 'statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct.'") (quoting Lemon v. Kurtzman, 411 U.S. 192, 199 (1973)) (footnote omitted), cert. denied, 111 S.Ct. 246 (1990). Therefore, in light of the Third Circuit's restrictive language in the *Ironworkers'* footnote which in turn is based on the requirements of a *Chevron* analysis, I conclude that the Third Circuit did not intend for its conclusion regarding retroactivity of the *Deklewa* Board's new rule to automatically apply to this case.

Having found that the Third Circuit conclusion in *Ironworkers* is not directly applicable, I shall not determine whether the Board's new rule should nevertheless be given retroactive effect here in accordance with the criteria set forth in *Chevron*. In making this determination, this court is well aware that the closer this record is to the facts of *Deklewa*, the more significant the *Ironworkers* decision will become in my analysis.

B. The *Chevron* Analysis

There is a general presumption in favor of the retroactive application of a new rule or decision. Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987) ("The usual rule is that federal cases should be decided in accordance with the law existing at the time of the decision."); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981).[41] However, where the facts of a particular case

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41. Recently, the Supreme Court has begun to question, if not challenge, this presumption as it applies to the retroactive application of federal statutes. For instance, in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 108 (1988), the Court stated: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Nevertheless, despite this pronouncement, the Court has not explicitly overruled any of its prior decisions which supported the presumption. See Kaiser Aluminum & Chemical Corp v. Bonjorno, 494 U.S. 827, 837-38 (1990) (acknowledging but not resolving tension between *Bowen* and *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) in which the Court held that intervening changes in the law should be retroactively applied to pending cases). But see *Kaiser*, 494 U.S. at 841 (Scalia, J., concurring) (finding the tension between *Bowen* and

meet the three criteria set forth in *Chevron*, the Supreme Court has created an exception to this presumption and held that a new rule will only apply prospectively. Those criteria are:

> First the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice of hardship' by a holding of nonretroactivity."

Bradley irreconcilable); DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377, 1388-93 (10th Cir. 1990) (same), cert. denied, 111 S.Ct. (1991).

Chevron, 404 U.S. at 106-07 (citations omitted). Accordingly, this court will evaluate the facts of this case in light of each of these three criteria.

With respect to the first criteria--that the new principle of law overrule clear past precedent on which the litigants may have relied--both parties agree the *Deklewa* rule represents a "sharp departure" from the Board's previous one which permitted parties to repudiate an agreement at any point prior to the union obtaining majority status. However, LIUNA contends that the defendants could not have reasonably relied on the rule's right to repudiate because its application was, in practice, complex and unpredictable. While this court agrees that in many cases the right to repudiate a pre-hire agreement was at best dubious because of the difficulties associated with determining when a union had reached majority status, the exercise of this right was not dubious in all cases or, more particularly, was not dubious in this case. LIUNA does not and arguably cannot contend that it obtained majority status at the MOEPSI project. Indeed, on the three separate occasions when the issue of LIUNA's majority status at the MOEPSI project was brought before the NLRB, the administrative law judge dismissed LIUNA's claims because the judge found that LIUNA lacked majority status at the work site. Therefore, this court concludes that the defendants could have reasonably relied on the right to generally repudiate a pre-hire agreement.

However, LIUNA next notes that the defendants did not attempt to repudiate their agreement generally but rather limited their repudiation of the agreement to the MOEPSI

project. LIUNA contends that this limited repudiation was not based on clear past precedent and, in any event, was invalid. I disagree. Based on the record before me, I conclude that the defendants initially believed they could not repudiate the agreement for a single project and that they did not want to repudiate the agreement as a whole. However, when FWEC finally notified LIUNA of its limited repudiation, it explicitly relied on *Painters Local 64 v. Epley*, 119 LRRM 3305 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), a decision that had just been rendered by the Eleventh Circuit which had jurisdiction over Alabama where the MOEPSI project was located. In *Epley*, the Eleventh Circuit stated:

> The parties stipulated that the union did not represent a majority of the employees at the Tuttle-White job. Taking into consideration the holdings in *Higdon*, *Haberman*, and *McNeff*, supra, we conclude that Epley had the clear right to repudiate or avoid the area-wide pre-hire agreement as to projects not yet begun, or projects underway, where the union had filed to establish its majority status. Give the fact that he union did not represent a majority of the workers at the Tuttle-White project, and Epley's clear repudiation in May of 1978, we can only conclude that the district court erred in holding Epley liable for fringe benefits for work performed on the Tuttle-White site.

Although the *Epley* decision was apparently the first decision to directly address the issue of single-site repudiations, this court is unwilling to engage in the sort of arbitrary "numbers game" where reliance on perhaps three decisions confirming a particular conclusion is held to be reasonable but reliance on one or two is not. *Epley* was a decision rendered by the appellate court which had jurisdiction over both the MOEPSI project and the parties. Its conclusion affirming single-site repudiations was unequivocal and was later confirmed by other several other courts. See C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350 (1st Cir. 1990); Wyoming Laborers Health Plan v. Morgen & Oswood Const. Co., 850 F.2d 613, 623 (10th Cir. 1988); New Mexico v. Jordan & Nobles Const. Co., 802 F.2d 1253, 1256 (10th Cir. 1986); Trustees for Mich. Laborers Health Care Fund v. Vander Veen Constr. Co., 736 F. Supp. 138, 144 (W.D. Mich. 1989). Although this court does not believe these court's decisions affirming single-site repudiations represent an ideal balance of the purposes between the national Labor Relations Act,[42] I find that they

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42. At trial, Mr. Daniel Quinn Mills testified as LIUNA's expert on National Agreements. He explained that employers and unions enter into national pre-hire agreements because such agreements satisfy certain significant interest of each one. The employer retains fixed labors costs nationally which permits the employer to easily expand its business beyond its customary boundaries to area where the union is particularly strong. Similarly, unions are assured that the employer's construction project will be completed with union labor who will be paid set wages and benefits even in areas where the union is weak and could not command such concessions. When either party is permitted to repudiate a national agreement at a single site, he concluded that the party seriously undermines the balance of interests supporting the agreement and, hence,

accurately reflected the balance of values supporting the pre-*Deklewa* rule. Accordingly, this court concludes that the defendants had a right to limit their repudiation to the MOEPSI project under the pre-*Deklewa* rule and that their reliance on *Epley* was reasonable.

Finally, LIUNA contends that the defendants should be equitably estopped from relying on LIUNA's non-majority status as the basis for their right to repudiate because the defendant's failure to comply with the pre-hire agreement substantially prevented LIUNA from obtaining the requisite status. This arguments may be summarily dismissed. Although it is an open question whether or not the doctrine of equitable estoppel may be asserted to enforce an 8(f) pre-hire agreement, compare Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1217 (6th Cir. 1987) ("The equitable doctrines of estoppel and waiver are applicable in a section 301 action to enforce a labor contract."), cert. denied, 484 U.S. 820 (1987) and Hass v. Darigold Dairy Products Co., 751 F.2d 1096, 1099 (9th Cir. 1985) (same)

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the rationale for entering into one. Therefore, he concludes that neither party should be permitted to repudiate a national agreement on a project-by-project basis. See Tr. at 49-51.

This court is persuaded that Mr. Mill's argument and conclusion demonstrate how national agreements *should* have been interpreted under the pre-*Deklewa* rule. However, in light of the pre-*Deklewa* caselaw which liberally construed the right to repudiate a pre-hire agreement, this court is doubtful that this is how a national agreement would have been interpreted by either the Board or the Supreme Court under the pre-*Deklewa* rule. Indeed, in those few cases directly on point, all uphold an employer's right to limit its repudiation to a single site. See cases cited supra in accompanying text.

to Local 92 v. B & B Steel Erectors, Inc., 850 F.2d 1551, 1555 (11th Cir. 1988) (application of equitable estoppel to enforce pre-hire agreement is contrary to congressional concerns regarding employee freedom to select its own bargaining agent and Supreme Court precedent), this court need not resolve the issue. To successfully assert an estoppel remedy, LIUNA must approach the court with clean hands. In other words, its efforts to obtain majority status must have been proper and, hence, worthy of this court's support. Here, the record indicates that the local union hiring hall utilized a discriminatory referral system which clearly favored union members above non-union members. Since both federal and state law required referrals without regard to union affiliation, see 29 U.S.C. § 158(a)(3), (b)(2); Alabama Code Section 25-7-30, LIUNA's affiliate was essentially operating an illegal hiring hall. In light of its own "unclean hands," LIUNA is not entitled to equitably estop the defendants from relying on LIUNA's lack of majority status as the basis for their right to repudiate the agreement at MOEPSI.[43] Therefore, having addressed and rejected each of LIUNA's arguments that the defendant's reliance on their pre-*Deklewa* rights was unreasonable, I find that the defendants have met the first criterion of the *Chevron* test.

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43. The defendants argue that LIUNA's "unclean hands" have additional ramifications regarding the defendants' legal liability and LIUNA's damages. I am not convinced. Therefore, at this time, I find LIUNA "unclean hands" prohibit LIUNA solely from obtaining equitable relief.

As previously noted, the second *Chevron* criterion is whether the retroactive application of the new rule to this case will further or retard its underlying principles. Emphasizing that this case involves solely a historical dispute, the defendants argue that the retroactive application of the *Deklewa* rule would not advance employee free choice or promote labor relations stability. However, both the *Deklewa* Board and, more importantly, the Third Circuit came to the opposite conclusion. The *Deklewa* Board first found that its new rule generally promoted both these principles better than the pre-*Deklewa* rule. It explained:

> We have not merely parsed the case precedent and legislative history in order to arrive at yet another "tenable" construction of the statutory language. Rather, consistent with our mission as the administrative agency responsible for enforcing the NLRA, we have applied our cumulative individual and institutional experience and expertise toward achieving, consistent with our reading of the statutory language and our interpretation of the legislative intent, what we perceive to be a better application of the statute. Given the present state of the law in this area, we see no alternative but to exercise our prerogative to do so.

Deklewa, 282 NLRB at 1385 n.40 (emphasis added). The Board then determined the benefits of the new rule so outweighed its burdens that it should be applied retroactively in all cases, including *Deklewa* which involved a historical

dispute. The Third Circuit upheld both conclusions in *Ironworkers*. Therefore, since both this case and *Deklewa* involve historical disputes, I find that I am bound by the Third Circuit's affirmance of the *Deklewa* Board's conclusion that the retroactive application of the *Deklewa* rule to a historical dispute furthers employee free choice and labor relations stability.

The third *Chevron* criterion focuses on whether or not the retroactive application of the new principle would result in a substantial inequitable result. I believe it will. As this court previously noted, LIUNA did not have an actual majority at the MOEPSI work site. Nor did LIUNA have a constructive one. As a result, this court found the defendants had a right to repudiate the agreement under the pre-*Deklewa* rule. The defendants clearly did not attempt to exercise this right immediately. Indeed, as I will discuss in the next section, the defendants tried to deceive the union about the applicability of the national agreement to the MOEPSI project for a long time. However, the defendants eventually repudiated the agreement before it expired. See supra pages 39-45. Since the defendants did exercise a right to which they clearly were entitled at the time, I conclude it would be a manifest injustice to deprive them of this right retroactively.

Having applied the *Chevron* criteria to the facts before me, this court has found that the defendants have carried their burden of proof with respect to the first and third criteria but not the second. In other words, although I have found the new rule more effectively promotes the purposes behind section 8(f) than the old rule, I also

concluded that the defendants reasonably relied on the old rule such that it would be a manifest injustice to apply the new rule retroactively in this case. Accordingly, after balancing these findings, I conclude that this court cannot apply the *Deklewa* rule retroactively to this case.

Although this issue has not been addressed by the Supreme Court, my conclusion here is in accordance with those of other circuit and district courts which have addressed the issue of the *Deklewa*'s retroactivity. For instance, in every case involving a historical dispute where the union's majority status was not apparent from the record, the court refused to apply the *Deklewa* rule retroactively. See C.E.K. Indus. Mechanical Contractors v. NLRB, 921 F.2d 350, 358 (1st Cir. 1990); United Bros. of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc., 906 F.2d 200, 203-04 (5th Cir. 1990); Mesa Verde Const. v. North Cal. District Council of Laborers, 895 F.2d 516, 519 (9th Cir. 1989); Constr. Indus. Welfare Fund v. Jones, 672 F. Supp. 291, 293-94 (N.D.Ill. 1987); Trustees of Michigan Laborers Health Care Fund v. M.M. Vander Veen Construction Co., 736 F. Supp. 138, 141-42, 145 (W.D.Mich. 1989); National Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection, 680 F. Supp. 731, 735 (D. Md. 1988). Similarly, in those cases where the union had clearly achieved majority status prior to the employer's repudiation, courts have retroactively applied the *Deklewa* rule because the employer would be liable under either the old or the new rule. See NLRB v. W. L. Miller Co., 871 F.2d 745 (8th Cir. 1989) ("[Although we apply *Deklewa* retroactively in this case, w]e are hesitant to adopt a strict rule that an employer could never haver reasonably

relied on its ability to repudiate a section 8(f) agreement. There were obviously some situations where a Union signatory did not enjoy anything close to majority status, and the possibility of conversion was therefore remote."); *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611-12 (7th Cir. 1990); *Ironworkers*, 843 F.2d at 781. Accordingly, for all these reasons, this court refuses to apply the *Deklewa* rule retroactively to this case.

C. The Date of Repudiation

Having decided that the *Deklewa* rule cannot be applied retroactively to this case, this court must now determine when, if at all, the defendants repudiated the National Agreement with LIUNA. However, in order to reach this issue, I must address two preliminary points. First, I note that the right to repudiate a pre-hire agreement under pre-*Deklewa* rule is based on and derived from the National Labor Relations Act rather than from the terms of the pre-hire agreement itself. As a result, the issue of whether the defendants repudiated the National Agreement is properly before this court rather than before the arbitrator.[44] See Camping Const. Co. v. District Council, 915 F.2d 1333, 1338 (9th Cir. 1990), cert. denied, 111

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44. Even if this issue was arbitrable, neither party sought on remand to have this court refer it to arbitration. Indeed, both parties submitted extensive proposed findings of fact and conclusions of law on the merits of this issue to this court. As a result, I conclude that parties waived any objection to resolution of this issue by the court or, alternatively, that parties consented to this court's adjudication of it.

S.Ct. 1684 & 2260 (1991); Brotherhood of Teamsters and Auto Truck Drivers Local 70 v. Interstate Distributor Co., 832 F.2d 507, 511 n.4 (9th Cir. 1987); Ion Const. Co. v. District Council of Painters No. 16, 803 F.2d 1050, 1051 (9th Cir. 1986); Griffith Const. v. United Bros. of Carpenters & Joiners, 785 F.2d 706, 712 n.5 (9th Cir. 1986). Second, as previously indicated, the defendants have agreed not to contest LIUNA's allegation that FWEC was the "alter ego" of FWC. An "alter ego" is a successor corporate entity which shares substantial identity of management, business purpose, operations, equipment, customers, supervision, and ownership with its predecessor and was specifically created by the predecessor to avoid the predecessor's labor responsibilities. See Eichleay Corp. v. Int'l Ass'n of Iron Workers, 944 F.2d 1047, 1059-1060 (3rd Cir. 1991), cert. dismissed, 112 S.Ct. 1285 (1992); NLRB v. Onmitest Inspection Services, Inc., 937 F.2d 112, 117-122 (3rd Cir. 1991); NLRB v. Scott Printing Corp., 612 F.2d 783, 785-87 (3rd Cir. 1979). When a successor corporate entity is found to be the alter ego of its predecessor, both corporate entities become responsible for the other's labor obligations and, hence, violations. Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 259 n.5 (1974); *Scott Printing*, 612 F.2d at 785. In this case, the National Agreement applied to "any person, firm or corporation owned or financially controlled by the Employer." All parties agreed that EPC was a wholly-owned subsidiary of FWC. Therefore, by not contesting that FWEC is the alter ego of FWC, the defendants are also not contesting that EPC was bound by the National Agreement. See Laborers' Int'l Union v. Foster Wheeler Corp., 868 F.2d 573, 575 (3rd Cir. 1989) ("EPC was bound by the

National Agreement as FWC's subsidiary only if FWC was itself bound by the National Agreement."). With these two points in mind, I turn to the issue of repudiation.

Repudiation of a pre-hire agreement by an employer is accomplished by words or actions sufficient to provide the union with actual knowledge that the agreement will not be followed. See Trustees of the Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Const. Co., 850 F.2d 613 (10th Cir. 1988) ("[C]onduct, without more, may constitute repudiation."); Contractors Health & Welfare Plan v. Harkins Const. & Equip. Co., 733 F.2d 1321, 1326 (8th Cir. 1988) ("In order to constitute a repudiation, the conduct must be sufficient to put the union and the employees on notice that the agreement is terminated."); Painters Local Union No. 164 v. Epley, 764 F.2d 1509 (11th Cir. 1985) (statement that employer was not going to use union labor on specific project sufficient to repudiate agreement), cert. denied, 475 U.S. 1120 (1986); International Ass'n of Bridge Iron Workers, Local Union No. 103 v. Higdon Constr. Co., 739 F.2d 280, 282 (7th Cir. 1984) (7th Cir. 1984) (words plus conduct inconsistent with agreement sufficient to repudiate agreement). In my October 7, 1987 opinion which has been vacated by the Third Circuit, I concluded that EPC's letter to LIUNA on June 3, 1985 provided sufficient notice to LIUNA of EPC's intent not to comply with the National Agreement and, hence, was sufficient to repudiate it. Relying on the arbitrator's determination that FWC and FWEC were alter egos and that EPC and FWEC constituted a single employer, I further concluded that EPC's repudiation bound both FWC and FWEC. All parties have asked that I reconsider these conclusions.

The defendants argue that LIUNA was repeated notified--directly by EPC and FWEC and indirectly through the media--that EPC was an open shop employer who would use non-union labor for the MOEPSI project. Indeed, the defendants contend that LIUNA acknowledges in its complaint that parties disputed the application of the National Agreement as early as October 1984. Accordingly, the defendants contend that their repudiation of the National Agreement occurred much earlier than this court's initially concluded. By contrast, LIUNA contends that the defendants never actually repudiated the agreement. Prior to EPC's June 3, 1985 letter, LIUNA contends that both the defendants and EPC denied that the National Agreement was applicable to the MOEPSI project. Although LIUNA seemingly concedes that EPC's letter of June 3, 1985 provided sufficient notice of EPC's disavowal of the Agreement, LIUNA contends that EPC's repudiation did not extend to the defendants. Since FWEC's letter of July 11, 1985 simply denied the agreement was applicable to the MOEPSI project, LIUNA argues that it too was insufficient to repudiate the Agreement. Finally, LIUNA contends that FWEC's August 9, 1985 letter fails to repudiate the agreement because it limits the repudiation of national-wide agreement to a single project. Therefore, LIUNA argues that the defendants did not repudiate the agreement until July 15, 1986, when the MOEPSI project ended.

After carefully reviewing and reconsidering my previous conclusion that the defendants repudiated the National Agreement on June 3, 1985 in light of parties' arguments and the applicable caselaw, I now decline to reaffirm it. I also reject the defendants' arguments that they

repudiated the agreement by their conduct prior to June 3, 1985. Instead, I find that the defendants' repudiated the National Agreement when FWEC wrote to LIUNA on August 9, 1985 and formally disavowed the Agreement with respect to the MOEPSI project.

As I previously mentioned, to successfully repudiate the National Agreement, the defendants needed to openly communicate to LIUNA--through words or conduct--their intent to disavow it. In this case, I find the evidence overwhelmingly indicates that no one disavowed the agreement until June 3, 1985 at the earliest. Instead, both the defendants and EPC unanimously and repeatedly claimed the Agreement did not apply to either EPC or the MOEPSI project. Claiming a pre-hire agreement is not applicable to a particular project is distinguishable from disavowing it in at least one critical respect: an employer can claim a pre-hire agreement is not applicable to a particular project but still be acting in accordance with the agreement. However, the employer cannot disavow the agreement and at the same time act in accordance with it. Therefore, by claiming the agreement was not applicable, neither the defendants nor EPC repudiated it.

Furthermore, as part of their effort to support their claims that the National Agreement did not apply to EPC or the MOEPSI project, I find the defendants worked to conceal the ample evidence of FWEC's extensive involvement in the

bidding process and in MOEPSI' project management.[45] For instance, during the bidding process, FWEC officials and employees used FWIC's letterhead to communicate with Mobil. Similarly, although FWEC employees actually prepared the bid and Mr. Sarappo suggested conducting the project management from FWEC's headquarters at the Houston Engineering Center, FWIC and later EPC were technically designated as MOEPSI's project managers. These actions and the others detailed in the findings of fact convince this court that the defendants not only failed to repudiate the National Agreement prior to June 3, 1985 but that they actively deceived LIUNA regarding its applicability.

On June 3, 1985, EPC wrote to LIUNA, denying it was a bound by the National Agreement and, alternatively, repudiating the Agreement if it was. Clearly, this letter was sufficient to provide LIUNA with notice of EPC's

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45. Indeed, this court notes the record is full of evidence which would support a conclusion that FWEC acted as a single employer with EPC. See *Eichleay*, 944 F.2d at 1059 (As with the alter ego analysis, a single employer analysis focuses the interrelation of operations, common management, centralized control of labor relations, and common ownership); see also Before, Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation, 1987 Wis. L. Rev. 67, 101 (discussing the distinct historical roots of two doctrines and their many practical similarities). However, I need not determine this issue because it is not properly before me. See *Eichleay*, 944 F.2d at 1059 n.12 (whether or not signatory to a pre-hire agreement is an alter ego should be determined by an arbitrator).

repudiation. However, when viewed in the factual context of this litigation, it is not sufficient to provide LIUNA with notice of the defendants repudiation. Again, EPC had denied that it was directly or indirectly bound by the National Agreement from the beginning of its involvement with the MOEPSI project. Similarly, FWEC consistently denied that it was involved in management of the MOEPSI project. Although it is clear to this court that LIUNA suspected there were closer ties among the defendants and EPC then they admitted and suspected that EPC was bound by the National Agreement through its relationship the defendants, it is also clear that LIUNA could not have actual knowledge of these facts in the face of defendants' and EPC's repeated denials. As a result, it could not actually know that EPC's repudiation of the National Agreement should extend to the defendants. Certainly nothing in EPC's letter indicated it was speaking for more than itself. Therefore, despite the legal ramifications of defendants' concession at trial that they were alter egos, I conclude that EPC's repudiation did not extend to FWC and FWEC.

As previously noted, FWEC, who was the signatory to the National Agreement, wrote to LIUNA on August 9, 1985 and specifically repudiated the Agreement as it applied to the MOEPSI project. In my discussion of *Deklewa*'s retroactivity, I found that single-site or limited repudiations were valid. See supra pages 32-34. Accordingly, I find that FWEC's letter to LIUNA on August 9, 1985 was sufficient to repudiate the National Agreement with respect to the MOEPSI project. LIUNA is, therefore, entitled to those damages it incurred as a result of the defendants' failure to

abide by the terms of the National Agreement until August 9, 1985.[46]

Conclusion

For all the foregoing reasons, I find that *Deklewa* should not be applied retroactively to this case. Furthermore, I find that the defendants did not repudiate their pre-hire agreement with LIUNA until August 9, 1985.

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46. Since parties stipulated as to what LIUNA's damages would be if this court had found the date of repudiation to be June 3, 1985, this court trusts they will be able reach agreement again. Therefore, this court grants parties twenty days in which to notify this court that they have either reached an agreement as to damages or require judicial adjudication of that issue.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Plaintiff, v. FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION, Defendants.	Civil Action No. 85-4240 (Harold A. Ackerman) TRIAL ORDER

This matter having been submitted to the court for trial without a jury; and this court having held a two-day trial; and having carefully considered parties' briefs, trial submissions, testimony, and exhibits, and thier proposed findings of facts and conclusions of law; and for the reasons set forth in an opinion issued this same day; and for good cause shown;

IT IS on this 22 day of June, 1992:

ORDERED that the new rule announced in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enforced sub. nom. International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3 v. National Labor Relations Board, 843 F.2d 770 (3rd Cir.), cert. denied, 488 U.S. 889 (1989), shall not be applied retroactively in this case; and it is further

ORDERED that the defendants repudiated their pre-hire agreement with plaintiff on August 9, 1985; and it is further

ORDERED that parties must notify this court within twenty days of this order that they either have agreed upon plaintiff's damages or seek to submit the issue of damages to this court for resolution.

/s/ Harold A. Ackerman
Harold A. Ackerman
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AFL-CIO, Plaintiff, v. FOSTER WHEELER CORPORATION and FOSTER WHEELER ENERGY CORPORATION, Defendants.	Civil Action No. 85-4240 (HAA) OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the court on a motion by plaintiff Laborers' International Union of North America, AFL-CIO ("LIUNA"), for reconsideration and clarification of this court's June 22, 1992 Trial Opinion, which found that defendants repudiated a national pre-hire collective bargaining agreement (the "National Agreement") with LIUNA on August 9, 1985. LIUNA asks this court to reconsider its decision that the holding of *John Deklewa &*

Sons, 282 NLRB 1375, *aff'd*, *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. National Labor Relations Board*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1989) ("*Deklewa*") did not apply retroactively in this case. *Deklewa* essentially eliminated a signatory's right to repudiate a pre-hire agreement.

A party moving for reconsideration "must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" *G-69 v. Degnan*, 748 F.Supp. 274, 275 (D.N.J. 1990) (citations omitted). Such a motion is improper when it simply asks the court "to rethink what the Court had already thought through -- rightly or wrongly," *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983). LIUNA essentially does just that here. It basically argues that the court perhaps did not properly understand and distinguish between its original arguments, and so attempts to clarify them for the court. It does not, however, present any new matters or controlling decisions which the court has overlooked, and so I will deny its motion for reconsideration.

LIUNA also asks the court to clarify its ruling on the issue of damages; specifically, whether that issue should be resolved through arbitration or through adjudication by this court. I agree with LIUNA that my Opinion was unclear on this point, and rule that, since the parties have been unable

to agree upon an amount of damages, that issue should be resolved through arbitration.

In a series of cases over thirty years ago, the Supreme Court addressed the issue of arbitration. The Court articulated several principles: (1) for a claim to be arbitrable, the parties must have agreed to submit to arbitration, *see Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also Laborers' Intern. Union v. Foster Wheeler Corp.*, 868 F.2d 573, 576 (3d Cir. 1989); (2) the judge must determine whether there is a duty to arbitrate and what issues must go to arbitration, *see Warrior & Gulf* at 582-83; *Foster Wheeler* at 576; (3) in determining whether the parties have agreed to submit a grievance to arbitration, a court is not to rule on the merits of the claim, *see Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); (4) where the contract contains an arbitration clause, there is a presumption of arbitrability, and this presumption applies with special force where the clause is broad. *Warrior Gulf* at 584-85; *see also AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986).

This court found that the defendants repudiated the National Agreement on August 9, 1985, and thus were liable for any damages incurred by LIUNA as a result of their breach of the Agreement until that date. The parties were obligated to arbitrate "any dispute over the application or interpretation of" the National Agreement, *see* Article XV, National Agreement (emphasis added). The issue of damages resulting from breach of the Agreement is inherently tied to defendants' obligations under the

Agreement, and falls within the scope of an arbitrator's decision-making authority. *See United Paperworkers v. Misco*, 484 U.S. 29, 41 (1987). Thus, that issue is properly submitted to arbitration[47]

THEREFORE, it is on this 11th day of March, 1993:

ORDERED that LIUNA's motion for reconsideration is denied; and it is further

ORDERED that this matter be sent to Arbitration for resolution of the amount of damages incurred by LIUNA until August 9, 1985.

/s/ Harold A. Ackerman
Harold A. Ackerman,
U.S.D.J.

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[47]The fact that the agreement was terminated before arbitration was sought is of no matter. Absent an express provision excluding grievances raised after repudiation, the dispute is arbitrable if it arises out of the agreement. *See Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 253-55 (1977).

Moreover, defendants' argument that this court should decide the issue as a corollary to its power to decide when repudiation of the agreement occurred must fail. While it is true that the act and date of repudiation are relevant to the calculation of damages, the amount of damages also depends upon much more -- factors relating to defendants' obligations arising out of the agreement.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
HAROLD A. ACKERMAN
JUDGE

UNITED STATES
DISTRICT COURT
POST OFFICE BOX 999
NEWARK, NEW JERSEY
07101-0999

March 29, 1993

TO: All Litigants On Attached List

RE: Laborers International Union of North America v. Foster Wheeler Corporation and Foster Wheeler Energy Corporation, Civil Action No. 85-4240 (HAA)

Dear Litigants:

This letter is in response to defendants' request to file a motion for reconsideration of this court's March 15, 1993 Opinion and Order. As my law clerk, Mr. Burke, communicated to Mr. Francis Mastro, I suggested that defendants address a letter to the court explaining why, after a lengthy Trial Opinion and subsequent Motion for Reconsideration (in which the court entertained arguments from both sides on precisely the issues raised in defendants' letters), defendants felt a second Motion for Reconsideration of my ruling on the first Motion for Reconsideration was

appropriate. I have read the letters submitted by defendants, and have been apprised of the concerns raised by all counsel in a phone conference held today with Mr. Burke.

I will not hear a second Motion for Reconsideration. As I explained in my Opinion and Order, the issues of damages and liability are inherently tied together. The issue of whether there has been any breach of the agreement and what damages might flow from that shall, as provided in the National Agreement and as I ruled on March 15, be resolved through arbitration.

Sincerely,

/s/ Harold A. Ackerman
Harold A. Ackerman
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5208, 93-5233, 93-5243

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

Appellant in No. 93-5208

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION

Foster Wheeler Energy Corporation
Appellant in No. 93-5233

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO,

v.

FOSTER WHEELER CORPORATION;
FOSTER WHEELER ENERGY CORPORATION

Foster Wheeler Energy Corporation
Appellant in No. 93-5243

(D.C. Civ. No. 85-04240)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges and YOHN, District Judge*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellee/ Cross-Appellant Foster Wheeler Energy Corporation having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/Ralph R. Becker
Circuit Judge

DATED: Jul 08 1994

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* As to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5208, 93-5233 and 93-5243

Laborers' International Union
of North America, AFL-CIO,
Appellants/Cross-Appellees

vs.

Foster Wheeler Corporation;
Foster Wheeler Energy Corporation,
Appellees/Cross-Appellants

(Motion filed by Foster Wheeler Energy Corporation)
and
separate
(Motion filed by Foster Wheeler Corporation)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until **August 15, 1994**

/s/_____
Circuit Judge

Dated: August 5, 1994

STATUTES INVOLVED

NATIONAL LABOR RELATIONS ACT
SECTION 8(f)
29 U.S.C. § 158(f)

(f) Agreement covering employees in the building construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organiozation has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment

with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

LABOR MANAGEMENT RELATIONS
ACT OF 1947
SECTION 301
29 U.S.C. § 185

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisidiction of the parties, without respect to the amount in

controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

CODE OF ALABAMA 1975
TITLE 25. INDUSTRIAL RELATIONS AND LABOR.
CHAPTER 7. LABOR UNIONS AND LABOR RELATIONS.
ARTICLE 2. RIGHT TO WORK.

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s **25-7-30** Declaration of policy.

It is hereby declared to be the public policy of Alabama that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

(Acts 1953, No. 430, p. 535, s 1.)

D. F. MOORE CRAIG, ESQ.
1129 Bloomfield Avenue
West Caldwell, NJ 07006
(201) 575-7733
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AMERICA, AFL-CIO, Plaintiff,	:	Civil Action No. 85-4240-HAA
vs.	:	COMPLAINT
FOSTER WHEELER CORPORATION, and FOSTER WHEELER ENERGY CORPORATION, Defendants.	:	

Plaintiff, Laborers' Internatioanl Union of North America, AFL-CIO, having its principal place of business at 905 16th Street, N.W., Washington, D.C. complaining of the defendants, says:

1. The jurisdiction of the District Court is based upon Section 301 (a) of the Labor-Management Relations Act, 29 U.S.C. § 185 (a) and 28 USC. § § 1331 and 1337.

2. Venue is appropriate in this District Court under the venue provisions of 28 U.S.C. § 1391, in that defendants are corporations doing business within the geographical jurisdiction of this Court.

3. The acts herein described affect interstate commerce.

Parties

4. Plaintiff Laborers' International Union of North America, AFL-CIO ("LIUNA") is a labor organization within the meaning of 29 U.S.C. § 152(5) and 29 U.S.C. § 185(a). Plaintiff LIUNA brings this action on behalf of itself, its affiliated Local 70 and its members in its representative capacity.

5. Defendants Foster Wheeler Corporation ("FWC") and Foster Wheeler Energy Corporation ("FWEC") are employers whose activities affect commerce within the meaning of 29 U.S.C. § 152(2), (6), and (7) and 29 U.S.C. § 185(a). FWEC is a wholly owned and controlled subsidiary of FWC. Energy Plant Constructors, Inc. ("EPC") and Foster Wheeler Intercontinental Corporation ("FWIC") are other wholly owned and controlled subsidiaries of FWC. Each defendant is engaged

in business within the geographical jurisdiction of this Court.

6. At all times material herein, FWC, FWEC, FWIC, and EPC were acting as the agents, servants and representatives of each other, and in committing the acts charged in this complaint, each had either apparent or actual authority to act on each others' behalf and have acted within the course and scope of that agency.

7. Upon information and belief, plaintiff alleges that at all times material herein FWC, FWEC, FWIC and EPC, and each of them, were alter egos, interrelated, overlapping, under common management, control and ownership and had common operations; and/or were successors or assigns of or to each other and were and are one employer in fact and in law as contemplated in the applicable collective bargaining agreement and under applicable law.

Claim for Relief

8. By and through its wholly owned and controlled subsidiary FWEC, FWC has a valid collective bargaining agreement ("Agreement") with LIUNA which at all relevant times herein was and is in full force and effect. A copy of the Agreement is attached. The Agreement provides in Article 1:

> This agreement shall apply on all construction projects within the United States, except for the states of New Mexico, Oklahoma and

Texas, performed by the Employer or by any person, firm or corporation owned or financial controlled by the Employer.

9. FWEC entered into the Agreement for and on behalf of FWC, FWIC and EPC. FWC, FWIC and EPC have benefited from the Agreement and with full knowledge of the acts of FWEC have acquiesced in and failed to renounce said action of FWEC and has, therefore, ratified and adopted the contract making it fully binding on each of them.

10. Prior to August 1984, FWC, by and through its subsidiaries FWEC, FWIC and EPC, negotiated and bid a contract to construct and to perform engineering, procurement and construction services in connection with the construction of a natural gas processing facility ("Mobil Project") to be built at the Bayou Jonas Industrial Park near Mobile, Alabama by Mobil Oil Exploration & Producing Southeast, Inc. ("MOEPSI"). FWC, by and through its subsidiaries FWIC, FWEC and EPC, was awarded the contract by MOEPSI. However, the construction contract was actually entered into by EPC, by and on behalf of and as a joint/single employer with and as the alter ego of FWIC, FWEC and FWC.

11. EPC, on behalf FWIC, FWEC and FWC, has entered into a number of subcontracts for the performance of construction work at the Mobil Project site with contractors which are not signatory to a collective bargaining agreement with plaintiff, and thereby, the defendants, and each of them, have violated the

subcontracting clause contained in Article XI of the Agreement. On information and belief, plaintiff alleges that EPC, on behalf of FWIC, FWEC and FWC, has and/or is about to enter into additional subcontracts for the performance of construction work at the Mobil Project site with contractors which are not signatory to collective bargaining agreements with plaintiff as required by the Agreement.

12. Since in or before October, 1984, a dispute has existed concerning the interpretation and application of the Agreement referred to above with respect to FWC, FWEC, FWIC and EPC's failure to comply with each and every of the provisions of the Agreement on the Mobil Project.

13. Since in or about April 9, 1985, and continuing to date, plaintiff has requested that FWC, FWEC and EPC provide plaintiff with information necessary to enforce and administer the Agreement. Each has failed or refused to provide such information.

14. On information and belief, plaintiff alleges that FWIC, FWEC and FWC improperly transferred in violation of the Agreement the work which would have been performed by plaintiff's members on the Mobil Project to EPC, which is an alter ego of or joint/single employer with FWC, FWEC, and FWIC. This improper transfer of work was done for economic advantage in an attempt to divert the work away from the plaintiff's members and to avoid defendants' obligations under the Agreement between the parties.

15. Article XV of the Agreement contains a grievance and arbitration procedure wherein the parties are bound to submit "all grievances and disputes, excluding jurisdictional disputes" to the grievance procedure which includes final and binding arbitration.

16. Since on or about April 9, 1985, and continuing to date, plaintiff has been willing and has sought to refer to the grievance and arbitration procedures in the Agreement the dispute referred to above. FWC, FWEC and EPC have refused and continue to refuse to submit this dispute to the grievance and arbitration procedures in the Agreement.

17. The actions of defendants, and each of them, referred to above constitute a breach of the Agreement between the parties.

18. At all times material herein, plaintiff has performed its obligations under the Agreement and has attempted to exhaust all contractual remedies available to it.

19. Plaintiff has no adequate remedies under the Agreement to compel defendants' compliance with the Agreement.

20. As a result of defendants' breach of the Agreement alleged above, plaintiff and its members have been damaged in that plaintiff's members were and will be deprived of employment opportunities and were not and will not be dispatched to or hired on the Mobil Project in

accordance with the requirements of the Agreement between the parties. Plaintiff and its members were and will be damaged by way of lost wages and fringe benefits which they would have received but for defendants' breach of the Agreement. The fringe benefit trust funds which are sponsored by plaintiff's affiliated Local 70 and Mobile, Alabama construction contractors have been and will be deprived of contributions as a result of defendants' breach of the Agreement.

21. As a result of defendants' breach of the Agreement referred to above, plaintiff and its affiliate have been damaged by way of lost union dues and per capital taxes which they would have received but for defendants' breach of the Agreement.

22. The actual amount of damages referred to above is unascertained at this point, and plaintiff prays for leave of Court to amend this complaint when those amounts are ascertained.

Prayer for Relief

WHEREFORE, plaintiff prays for relief as follows:

1. That this Court issue an order directing defendants, and each of them, to submit the dispute involving the interpretation and application of the collective bargaining agreement described herein to the grievance and arbitration procedures in the Agreement.

2. That, after trial of this matter, plaintiff in its representative capacity be awarded damages against defendants, and each of them, for the loss of employment opportunities, loss of wages and loss of fringe benefits by the members of plaintiff and for the loss of fringe benefit contributions by the trust funds in an amount to be ascertained at trial.

3. That plaintiff be awarded damages against defendants, and each of them, for loss of union dues and per capita taxes suffered by plaintiff and its affiliated Local 70 as a result of defendants' breach of the Agreement in an amount to be ascertained at trial.

4. That plaintiff be awarded such other and further relief as the Court deems just and proper.

/s/ D. F. MOORE CRAIG, ESQ.
1129 Bloomfield Avenue
West Caldwell, NJ 07006
(201) 575-7733

Robert J. Connerton
Theodore T. Green
Orrin Baird

CONNERTON, BERNSTEIN & KATZ
1899 L Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-6790

DATED: August 28, 1985

NATIONAL AGREEMENT

* * *

ARTICLE I

SCOPE OF AGREEMENT

This Agreement shall apply on all construction projects within the United States, except for the states of New Mexico, Oklahoma and Texas, performed by the Employer or by any person, firm or corporation owned or financially controlled by the Employer.

* * *

ARTICLE V

HIRING

Section 1.

The Employer agrees to comply with local area referral and hiring procedures contained in the local Laborers' agreement, provided such procedures meet state and federal laws and are not inconsistent with the terms of this Agreement.

Section 2.

The selection of applicants for referral shall be on a non-discriminatory basis and shall not be based on or in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions or any other aspect or obligation of Union membership, policies or requirements.

* * *

ARTICLE XV

GRIEVANCE PROCEDURE

* * *

The decision of the arbitrator shall be final and binding upon the Employer and the Union and its members. Such decision shall be within the scope and terms of this Agreement and in no event shall modify the terms of this Agreement.

January 30, 1985

Orrin Baird
Connerton, Bernstein & Katz
1899 L Street, N.W., Suite 800
Washington, D.C. 20036

On behalf of Laborers' International Union of North America, Local #70, I hereby authorize the law firm of Connerton, Bernstein & Katz to institute legal actions on behalf of the union relating to and arising out of the letting of construction contracts by Mobil Oil Exploration and Producing Southwest, Inc. for the lower Mobile Bay Mary Ann Field Gas Plant.

I understand that this authorization does not financially obligate myself or the union to the law firm of Connerton, Bernstein & Katz for any legal services or other expenses which might be incurred in connection with undertaking these legal actions.

Title: _____

_____
Laborers' International Union
of North America, Local #70

Laborers' International Union of North America

Local Union No. 70

AFL-CIO & CLC
February 28, 1985

Orrin Baird
Connerton, Bernstein & Katz
1899 L Street, N.W. Suite 800
Washington, D.C. 20036

On behalf of Laborers' International Union of North America, Local #70 I hereby authorize the law firm of Connerton, Bernstein & Katz to institute legal actions on behalf of the union relating to and arising out of the letting of construction contracts by Mobile Oil Exploration and Producing Southwest, Inc. for the lower Mobile Bay Mary Ann Field Gas Plant.

I understand that this authorization does not financially obligate myself or the union to the law firm of Connerton, Bernstein & Katz for any legal services or other expenses which might be incurred in connection with undertaking these legal actions.

/s/ Howard I. Henson
Regional Manager
Trustee
Laborers' International Union
of North America, Atlanta Region

(3) (3)

Nos. 94-311 and 94-312

Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FOSTER WHEELER CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

FOSTER WHEELER ENERGY CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-311

FOSTER WHEELER CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

No. 94-312

FOSTER WHEELER ENERGY CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Laborers' International Union of North America, AFL-CIO ("Union" or "Laborers" hereinafter), hereby files this Opposition to both the petition for a writ of certiorari filed by the Foster Wheeler Corporation in No. 94-311 and to the petition for a writ of certiorari

filed by the Foster Wheeler Energy Corporation in No. 94-312.

CITATION OF OPINIONS BELOW

Since the petitions for certiorari were filed, the opinion of the United States Court of Appeals for the Third Circuit as to which certiorari is sought has been reported at *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375 (1994).

STATEMENT OF THE CASE

The Petitioners, thrice found guilty of grossly employing deceit as a matter of corporate policy, now come to this Court pretending to innocence. This misconduct was directly relevant to the result below and makes this case unique, and not of general significance. This case is also not worthy of review because the principal legal issue raised will not recur; such overarching abstract theoretical issues as lurk in the background are obscured by the Petitioners' pervasive misconduct.

The fact of Foster Wheeler's fraud was found by an arbitrator [1] and confirmed by both courts below. 26 F.3d at 379 n.2 (App. 9a & n.2).[2] Yet, Petitioners provide no hint of these findings in their pending petitions. Instead, they set out the facts as if a neutral in this matter, the non-union Energy Plant Constructors ("EPC" hereinafter), not the employer, Foster Wheeler Energy Cor-

---

[1] FWC incorrectly asserts that the arbitrator's "award was vacated in its entirety in *Laborers' Int'l Union v. Foster Wheeler Corp.*, 868 F.2d 573 (3d Cir. 1989)." (FWC Pet. at 8.) The Third Circuit specifically ruled in its most recent opinion that it had *not* vacated the entire award in its 1989 decision and that the arbitrator's findings on several key issues are now the law of this case. 26 F.3d at 396-99 (App. 53a-62a). The validity of this ruling is not raised in the petitions.

[2] The latest opinion of the Third Circuit will be cited as in the official reporter with parallel references to the identical appendices filed by the petitioners.

poration ("FWEC" hereinafter), which was under contract with the Union, had been the *de facto* prime contractor on the project. (FWEC Pet. at 4; FWC Pet. at 5-6.)

It is therefore necessary to supplement Petitioners' statements of the case with an account of their misconduct, as found by the arbitrator and the courts below.

FWC's and FWEC's Bad Faith Conduct

Ultimately in dispute is whether a collective bargaining agreement, the "National Agreement," between Petitioner FWEC and the Laborers applied to the construction of a sour gas treatment and sulfur recovery facility built for Mobil Oil Exploration & Producing Southeast, Inc. ("MOEPSI" hereinafter) at a site on Mobile Bay, Alabama.

Foster Wheeler and the Laborers had been parties to a series of National Agreements for many years. These agreements covered constructon in all but three of the states and required signatory employers to hire construction laborers through hiring halls established by the Laborers' local union in whose area a particular project was to be performed. In this case, the MOEPSI project was in territory covered by Laborers Local 70 located in Mobile, Alabama. The National Agreement also obligated employers to limit the subcontracting of covered work to subcontractors which were also signatories with the Union. 26 F.3d at 379 (App. 8a).

In the early 1980's, MOEPSI began evaluating contractors for a gas treatment facility to be built near Mobile, Alabama. *Id.* FWEC was interested in being considered for this work, which was of the type covered by the National Agreement. FWEC believed that its chances of winning the contract would be improved if it could offer to do the work on a non-union basis. *Id.* at 380 n.2 (App. 10a n.2). To resolve this dilemma, FWEC

decided to engage in a fraud on the Union by bidding for the work under the name of a non-union nominee. The nominee would then be free to subcontract the engineering work (work not covered by the National Agreement) back to FWEC while performing or subcontracting the construction work on a non-union basis. *Id.*

FWEC first proposed to use its sister corporation, Foster Wheeler Intercontinental Corporation ("FWIC"), as its front. FWIC's operations were strictly in foreign countries; it had no employees in the United States and was not a signatory to any union agreement. *Id.* To carry out the plan, FWEC officials directed its employees to use the FWIC name and letterhead when communicating with third parties about the project. FWEC personnel consistently misidentified themselves as FWIC employees in the bid documents for the MOEPSI project that FWEC prepared in early 1984. *Id.* In 1984, MOEPSI was on the verge of officially awarding its project to FWIC when it was discovered that FWIC lacked the requisite license to become even the nominal prime contractor. FWEC then nominated another of its sister companies, the non-union construction company Energy Plant Constructors, to serve as prime contractor. *Id.* at 380 n.2 (App. 11a n.2).

MOEPSI awarded the project to EPC only after receiving a side letter from FWC in which the parent company guaranteed the work. Although, on paper, EPC had sole contractual authority to manage the project, project management was actually performed by FWEC employees. *Id.* EPC "subcontracted" the engineering work to FWEC and retained the construction work. *Id.* As a result of these arrangements, EPC had sole authority to perform the construction work, some of which it did with its own non-union work force, some of which it subcontracted to other non-union contractors. *Id.* at 381 (App. 12a-13a). No laborers on this project were hired through Laborers Local 70.

The use of FWIC, and later EPC, as the purported prime contractor had no rationale other than as a device to deceive the Union. FWEC admitted at trial that its use of FWIC's name was a matter of "semantics" and that the only difference resulting from FWIC's and EPC's nominal status was whether a union contractor or a non-union contractor like EPC performed the construction work. (District Court trial opinion, App. 242a.)

Thus, the record amply supports the trial court's finding that "the defendants worked to conceal the ample evidence of FWEC's extensive involvement in the bidding process and in MOEPSI's project management . . . [and] actively deceived [the Laborers] about the [National Agreement's] applicability," (App. 275a), and that Petitioners did so "for a long time," (App. 269a), and the Court of Appeals' finding that Foster Wheeler's arrangement "was suffused with subterfuge." 26 F.3d at 379 (App. 9a).

The Evolving Legal Standards

Since 1959, section 8(f) of the National Labor Relations Act has permitted a union and an employer in the construction industry to enter into a collective bargaining agreement prior to the commencement of construction on a particular project and, *a fortiori,* prior to the point at which the union attained majority employee support. 29 U.S.C. § 158(f). The difference between this rule and that governing other industries has led to a distinct body of law which has found its way to this court on several occasions. *E.g., Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983); *NLRB v. Local 103, Int'l Ass'n of Iron Workers (Higdon Constr. Co.),* 434 U.S. 335 (1978). The National Labor Relations Board's position has evolved over time with its latest attempt at comprehensive regulation coming in 1987 in *Deklewa.*[3]

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[3] *John Deklewa & Sons, Inc.,* 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), *cert. denied,* 488 U.S. 889 (1988). Hereinafter, the Board

While the MOEPSI project was under construction in 1985-86, federal labor law permitted contractors in the construction industry to repudiate their collective bargaining agreements at will, without regard to the term of the agreement, so long as the union had not yet attained majority support among employees. *R.J. Smith Construction Co.*, 191 NLRB 693, 695 & n.5 (1971), *enforcement denied sub nom, Local 150, International Union of Operating Engineers v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *Ruttman Construction Co.*, 191 NLRB 701, 702 (1971). Had FWEC repudiated its National Agreement in 1984, it could have openly pursued the MOEPSI project on a non-union basis in its own name. However, FWEC took no steps to repudiate the Agreement at that time and denied, as late as letters of July 11, August 2 and August 9, 1985, that it was repudiating the agreement through its conduct. *Id.* at 381 (App. 14a-15a).

FWEC decided against repudiation of the National Agreement for good reason: it wanted to retain the substantial benefits the agreement provided elsewhere. In exchange for its promise to apply the National Agreement throughout the United States, even in areas like Alabama where the local unions were weak and the jobs could otherwise be done non-union, FWEC gained the right to use the agreement in strong union areas. Before, during, and after the MOEPSI project, FWEC was performing other construction projects under the National Agreement and similar agreements with the Laborers in such strong union areas as California and Illinois. By cheating on its contractual obligations for at least a year and a half, FWEC could have its cake in these strong union areas and eat it in Alabama. *Id.* at 393-94 (App. 47a-48a).

In August 1985, FWEC adopted an alternative position —that it was repudiating the agreement only as to the

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decision will be cited as *Deklewa* and the Third Circuit's enforcement of that decision as *Iron Workers Local 3*.

MOEPSI project. FWEC based its "single-site" repudiation of the National Agreement on the July 1985 decision in *Painters Locan Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir.), *cert. denied*, 475 U.S. 1120 (1986), the first case which arguably permitted such limited repudiation.[4] *Id.* at 394 and n.19 (App. 48a and n.19). However, by the time FWEC purported to rely on *Epley*, such reliance was no longer detrimental—or even significant—because FWEC had long since contracted away its ability to comply with the National Agreement. *Id.* at 394 (App. 48a-49a). FWEC had already committed to MOEPSI that it would use EPC as a non-union construction subcontractor, EPC had already been awarded the contract, and EPC had already contracted with myriad non-union sub-contractors. FWEC had placed itself in this position when it pursued its scheme of setting up FWIC and then EPC as the nominal prime contractor and failed to impose on EPC and its subcontractors the contractual obligations necessary to meet FWEC's obligations under the National Agreement. *Id.* at 381-82 (App. 15a).[5]

The Laborers filed a grievance contending that the National Agreement applied to the project because FWC, EPC and FWEC were commonly controlled and therefore a single or joint employer[6] and because FWC, the

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[4] The District Court noted its agreement with the Union that *Epley* was a faulty interpretation of pre-*Deklewa* law as applied to multi-state collective bargaining agreements, such as the National Agreement here, because it destroyed the *quid pro quo* on which such agreements are founded. (App. 266a n.42).

[5] FWEC complains that there was no evidence to support the Third Circuit's finding that FWEC was unable to comply with the National Agreement in August 1985. (FWEC Pet. at 17.) However, the relevant agreements—both FWEC's/EPC's representations to MOEPSI that the job would be performed non-union and its subcontracts to non-union subcontractors—are in the record, as well as the direct testimonial admissions of company agents.

[6] *Cf. South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800, 802-03 & n.3 (1976) (*per curiam*) (interrelated opera-

parent of both FWEC and EPC, was FWEC's alter ego. On these premises, the Union argued that FWC and FWEC were bound under the terms of the National Agreement to apply the agreement to the MOEPSI project.[7]

The exposure of the employer subterfuge outlined above transformed the theoretical underpinnings of the Union's grievance. No longer did the Union need to prove that EPC, FWEC, and FWC were all a joint or single employer. As informed by the discovery of FWEC's actual role, the Union modified its contention to claim that FWEC was the prime contractor and that, therefore, the National Agreement applied directly to the MOEPSI project. For this reason, it became irrelevant whether EPC, FWC and FWEC were joint employers. Indeed, after the discovery of FWEC's actual status as the prime contractor—and the lengths to which it had gone to hide that role from the Union—it became irrelevant that the non-union contractor chosen as a front was the wholly-owned FWC subsidiary, EPC. FWEC's contractual liability would have been the same had it chosen an unrelated non-union construction company; it was still legally bound to have followed its collective bargaining agreement on its MOEPSI project.

When FWC and FWEC refused to arbitrate the grievance, the Laborers brought this action. The tortured procedural history of this case is adequately set forth in the petitions and in the opinion of the Third Circuit.

In 1987, the NLRB renounced its anomalous treatment of prehire collective bargaining agreements in the

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tions, common management and ownership, and central control of labor relations support single employer finding).

[7] While FWC eventually conceded after five years of litigation that it was FWEC's alter ego, that issue had lost its significance. Once the arbitrator found and the District Court confirmed that FWEC, the signatory to the National Agreement, was the *de facto* prime contractor on the project and had a direct obligation to apply the agreement, FWC's obligations became superfluous.

construction industry and decided, in *Deklewa*, that during their term such agreements ought to be treated like other labor contracts, without being subject to repudiation at the will of either party. Moreover, the Board held that its new rules for the interpretation of these agreements would be applied retroactively. The Third Circuit enforced the Board's order and expressly approved the Board's decision to apply *Deklewa* retroactively. *Iron Workers, Local 3*, 843 F.2d at 781.

In its decision below, the Court of Appeals decided that the *Deklewa* principles must also be applied retroactively in this case. The court reasoned, in part, that Foster Wheeler had not relied on a pre-*Deklewa* right of repudiation in any meaningful way. 26 F.3d at 395 (App. 50a-51a). The court found that Foster Wheeler had instead relied on its scheme of deceit, and that it "relied" on a purported right of repudiation only long after it had given up the right to require compliance with the National Agreement. *Id.* In other words, the court found that, even if Foster Wheeler had known in 1985 that the *Deklewa* principles would be applied and it could no longer repudiate its agreement with the Laborers at will, it had woven such a tangled web to deceive the union that it could no longer have extricated itself from the conundrum of its own making. *Id.*

In this context and in light of prior holdings that the retroactive application of the *Deklewa* principles would promote the interests of the NLRA, the Court of Appeals found no reason to depart from "the norm" of retroactive application of new rules of law. *Id.* at 394-95 (App. 49a-51a).

REASONS AGAINST GRANTING THE PETITIONS

I. THE QUESTION WHETHER *DEKLEWA* SHOULD BE RETROACTIVELY APPLIED WILL NEVER RECUR.

a. Both Petitioners posit as their first question for review the principal issue in the court below: whether *Deklewa* should be applied retroactively to the present case, which arises on facts transpiring before that decision. This issue is not worthy of review because, as found by the Third Circuit, it "will probably never recur." 26 F.3d at 378, & n.1 (App. 4a & n.1). The accuracy of this judgment is hard to question: the NLRB's decision is now seven years old. Counsel is unaware of any pending litigation either in court or in any administrative agency involving a pre-*Deklewa* contract repudiation. Issues which are not susceptible of repetition are unworthy of review in this Court. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

b. Moreover, the particular formulations of the *Deklewa* retroactivity questions presented by Petitioners lead up side jurisprudential alleys of marginal interest. As framed by FWEC, the Court of Appeals chose a five-factored test "to determine whether *Deklewa* should apply retroactively" but erred "by its clear misapplication of [that] test to the facts." FWEC Pet. at 15. Petitioner proceeds to argue point by point for its view of the proper application of each of the five factors. *Id.* at 15-23.

The application of a test to the facts of a case, as opposed to the choice or establishment of the test, only very rarely involves an important question of federal law warranting a writ of certiorari. This is not one of those exceptions. The facts of this case, as outlined above, are unique and the application of the five-factored test in this case is unlikely to be controlling elsewhere.

c. FWC makes a different point. FWC claims the appellate court's error to have been its failure to apply

a single-factor litmus test. Other courts of appeal have universally limited the retroactive application of *Deklewa*, asserts FWC, to cases in which the union had achieved majority status. (FWC Pet. at 13-16.)[8]

FWC's contention that there exists a conflict among the circuits over *Deklewa*'s retroactivity mistakes differing results with a true conflict of decisions. Neither the court below nor the other circuit courts which have ruled on *Deklewa*'s retroactivity sought to issue a definitive ruling which would apply in all circumstances, but instead limited their consideration to the facts before them. Accordingly, the Third Circuit did not consider its decision below to be in conflict with the decisions of the other circuits.

> Moreover, the fact that some recurring circumstances have been identified as rendering retrospective application of the *Deklewa* rule manifestly unjust does not dictate a similar result in other cases presenting a dissimilar coincidence of circumstances.

Id. at 391 (App. 39a).

The factual dissimilarities are readily apparent. None of the circuits which denied retroactive application of *Deklewa* involved the purposeful subterfuge engaged in by Foster Wheeler here. The pursuit of this subterfuge led Foster Wheeler to eschew reliance on its pre-*Deklewa* right of repudiation until it had become meaningless. *Id.* at 382, 393-94. This unique set of circumstances led the court to find that the "defendants had not in fact relied to their detriment upon the discarded rule, a factor of primary importance," and that this factor tipped the balance "strongly . . . in favor of retrospective application of the *Deklewa* rule to this case." *Id.* at 395.[9]

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[8] This test could only be applied to the issue of *Deklewa*'s retroactivity and therefore is an extremely limited question.

[9] This case also presents unique facts under pre-*Deklewa* law. The Laborers' argued in the courts below that, even under pre-*Deklewa* law, Foster Wheeler's purported repudiation would have been ineffective. The well-settled contract doctrine of "prevention"

Circuits deciding against retroactivity have similarly relied on the distinct facts before them. *C.E.K. Industrial Mechanical Contractors Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990) ("we find that this dispute is one in which manifest injustice would result from retroactive application of *Deklewa*); *United Bhd. of Carpenters, Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200, 203 (5th Cir. 1990) ("*Deklewa* cannot be applied retroactively in this case"); *Mesa Verde Construction v. Northern Cal. District Council of Laborers*, 895 F.2d 516, 519 (9th Cir.) *cert. denied*, 498 U.S. 478 (1990) ("retroactive application in this context" would be unjust). For example, in *C.E.K. Industrial*, the First Circuit denied retroactivity, in part relying on the fact that the employer had acted in a forthright manner with the Union. The Court found that the employer did not "attempt to take advantage of the benefits of a prehire agreement," but had "put the union on notice, well before the commencement of the alleged unfair labor practice, that he repudiated any agreement. . . ." 921 F.2d at 358-59.

Thus, the difference in the result of this case and those of the circuits deciding against the retroactivity of *Deklewa* is adequately explained by the different facts presented.

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holds that a party to a contract, who has wrongfully prevented the other party from fulfilling (or "substantially contributed to the non-occurrence" of) a condition precedent to the first party's obligations, is deemed to have waived the condition, and full performance of the contract is required. *Shear v. National Rifle Ass'n of America*, 606 F.2d 1251, 1254-55 (D.C. Cir. 1979); *NLRB v. Local 554, Graphic Communications Int'l Union*, 991 F.2d 1302 (7th Cir. 1993). *See generally, Restatement (Second) of Contracts*, § 269 (1973). This doctrine applies to prevent Foster Wheeler from relying on the Laborers' lack of majority support as a condition precedent to full enforceability of the prehire agreement, because Foster Wheeler's deceit substantially contributed to the Laborers' inability to achieve majority support among the relevant employees. The Court of Appeals did not reach this issue. 26 F.3d at 395 n.21.

d. The petitioners attempt to manufacture a conflict by arguing that the retroactivity *standard* applied by the Third Circuit is radically different than that employed by other courts. Some circuit courts considering *Deklewa*'s retroactivity, like the Third, have expressly applied the "manifest injustice" retroactivity test of *SEC v. Chenery,* 332 U.S. 194 (1947), which has been used to evaluate the retroactivity of agency adjudications. Others have applied the test set out in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), traditionally applied to test the retroactivity of court decisions. In practice, however, each circuit court facing the issue of *Deklewa*'s retroactivity for the first time, has looked to the same basic factors: the reasonableness and degree of the party's reliance on the prior law, the degree of injury, and the extent to which retroactive application serves the statutory interests. *NLRB v. Viola Industries,* 979 F.2d 1384, 1396-97 (10th Cir. 1992); *NLRB v. Bufco Corp.,* 899 F.2d 608, 612 (7th Cir. 1990); *Iron Workers, Local 3,* 843 F.2d at 781; *Fox Painting Co. v. NLRB,* 919 F.2d 53, 56 (6th Cir. 1990); *C.E.K. Industrial, supra; Mar-Len, supra*; and *Mesa Verde Construction, supra.*

Similarly, the choice of standard would not have made a difference in this case, as acknowledged by the Court of Appeals. 26 F.3d at 389 n.10 (in light of *Iron Workers, Local 3,* it is "doubtful" that use of the *Chevron* standard would have produced a different result).

Thus, despite differing labels and formulations, there is little substantive difference between the standard employed by the Third Circuit here and that used by the other circuit courts.

II. CERTIORARI IS NOT WARRANTED ON THE ABSTRACT QUESTION OF THE APPROPRIATE STANDARD TO GOVERN THE RETROACTIVITY OF DECISIONS OF ADMINISTRATIVE AGENCIES.

Attempting to frame an issue of broader application than retroactivity solely as it applies to the *Deklewa* decision, this Court, FWEC asserts, needs to finish the

job of determining whether adjudicated decisions should be retroactively applied. The Court commenced this task, says FWEC, in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), and *Harper v. Virginia Department of Taxation,* 113 S.Ct. 2510 (1993), where it considered the retroactivity of judicial adjudications. But the Court has not addressed the same question with respect to administrative adjudications, leading the courts of appeal to apply a variety of separate and inconsistent tests, according to FWEC. FWEC Pet. at 12-14.

The rebuttal to Petitioner's claim is twofold: the courts of appeal have not developed a clearly articulated split and, had they, these parties are plainly inappropriate to present such an issue to this Court.

a. Consideration whether a split exists starts from the pair of decisions in this Court which might have given rise to such a conflict. In *James B. Beam* and *Harper* this Court held that selective prospectivity in the application of the decisions of this Court violated the Constitution. (App. 27a.) The Third Circuit found that this Constitutional principle did not necessarily extend to agency adjudications, however. (App. 27a-33a n.8.[10]) Instead, reasoned the Third Circuit, the retroactivity of agency determinations is to be determined on a case-by-case analysis under the "manifest injustice" analysis of *SEC v. Chenery Corp.,* 332 U.S. 194 (1947). (App. 33a-36a & n.10.)

But the appellate decisions cited by FWEC as articulating a split in the circuits do not, in fact, even consider either the question whether *Beam* and *Harper* apply to agency decisions or the issue whether the *Chevron* and *Chenery* standards differ on this score. (FWEC Pet. at 13-14.) This is not surprising since, with the exception of the decision below, all of the circuit decisions

[10] It further ruled, however, that because it reached the same result even under its alternative standard, "we need not definitively decide this question." *Id.* at 32a n.8.

cited predate *Beam* and *Harper*. Indeed, before the issuance of *Harper* and *Beam*, even the Third Circuit believed that there was no substantive difference between the retroactivity analysis for judicial determinations under *Chevron* and for agency determinations under *Chenery*. *Iron Workers Local 3*, 843 F.2d at 780 n.12. A clearly articulated split among the circuits worthy of this Court's review must await further consideration of the application of *Beam* and *Harper* to agency decisions, a consideration which may be provoked by Judge Becker's opinion in this case.

Moreover, the current case is inappropriate for considering the retroactivity of agency decisions because it does not even arise from an agency determination. The current case involves instead a decision by the federal judiciary arising under Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. It puts the cart before the horse to ask this Court to entertain the question whether an agency decision should be retroactively applied in a federal contract action even before it considers whether the decision should be retroactively applied by the agency in other agency cases. Still worse, the Union's position below was not that *Beam* and *Harper* required the retroactive application of the National Labor Relations Board's determination in *Deklewa*. Rather, the Union was seeking the retroactive application of the Third Circuit's decision in *Iron Workers Local 3*, which enforced *Deklewa*, based upon the Third Circuit's independent considerations of the *Chevron* and *Chenery* standards there. 843 F.2d at 780 n.12. Whatever the merits of this argument, it substantially muddies the analysis of the proper standard to evaluate retroactivity of agency decisions, rendering this case an inappropriate vehicle for consideration of that issue.

b. Moreover, the current parties are unlikely to be zealous advocates in this debate because no one is prepared to espouse either of the principal positions: that *Beam* and *Harper* apply to agency decisions as well as court decisions or, alternatively, that *Chenery* requires a

different result. Judge Becker rejected the claim that *Beam* and *Harper* require that agency decisions be retroactively applied as a matter of law, holding instead that a *Chenery*/choice-of-law analysis applied.

Petitioners reject both of these principal alternatives on the agency retroactivity issue in favor of a position wholly of their own creation. Not surprisingly, Petitioners reject the application of *Beam* and *Harper* to agency decisions to avoid the retroactive application of *Deklewa*. But that does not lead Petitioners to embrace the claim that this Court's decision in *Chenery*, which purports to address the retroactivity of agency decision cases, dictates a contrary result. To embrace *Chenery* would lead to the Third Circuit's "manifest injustice" inquiry. Given Petitioners' campaign of corporate deception in this case, such an inquiry must inevitably lead to the conclusion that *Deklewa* should be retroactively applied here, the conclusion of Judge Becker. So Petitioners reject *Chenery* as well. Instead, it is *Chevron* which controls, claims FWC. (FWC Pet. at 17-20.)

Nor does the Union advocate either of the main alternatives. As noted above, the Union's position was that *Beam* and *Harper* required the retroactive application by the Third Circuit of its own decision in *Iron Workers Local 3* not the Board's decision in *Deklewa*. Since the Union prevailed on Judge Becker's alternative *Chenery* analysis, it has no reason to press its prior position in this Court.

Surely this Court's consideration of whether *Beam* and *Harper* apply to agency determinations or whether *Chenery* leads to a different result must await advocacy which is not driven to reject all of principal alternatives.

III. THE OTHER ISSUES PRESENTED IN THE PETITIONS DO NOT WARRANT REVIEW.

The remaining issues raised in the petitions are nothing more than claims that the Court of Appeals erred in applying routine principles of law to the facts of this case.

Thus, the Petitioners claim that the Third Circuit erred in referring the issues of contract breach and damages to the arbitrator because the arbitrator must conclude that no damages can be shown. (FWEC Pet. at 28-29.) The premise is that the hiring hall operated by Local 70, as to which no complaint or NLRB charge had ever been filed, unlawfully discriminated against members and that the contract excused the employer from using a discriminatory hall. Judge Becker's straightforward treatment of this diversionary issue is more than satisfactory and raises no issue worthy of certiorari. 26 F.3d at 400-01. (App. 66a-69a).[11]

FWEC asserts that it was unfairly surprised by the Court's use of a five-factored test to amplify the *Chenery* standard. (FWEC Pet. at 23.) However, in *Iron Workers, Local 3*, the Third Circuit clearly indicated its belief that "[t]he five factor analysis of *Chenery*" was relevant to consideration of *Deklewa*'s retroactivity. 843 F.2d at 780 n.12. Moreover, the Laborers have consistently argued that actual, detrimental reliance, the most weighty factor, was a crucial factor under *any* retroactivity standard and that Foster Wheeler had not so relied on pre-*Deklewa* law. FWEC knowingly chose to ignore the argument at its peril.

FWEC claims that *McNeff, supra*, limits section 301 jurisdiction to cases involving monetary obligations, not representation. (FWEC Pet. at 23-25.) The Union agrees. We seek backpay and money damages. We do not seek the right to represent the non-union workers on a job now long since completed.

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[11] Even if Foster Wheeler and its subcontractors properly hired employees on their own, this case would still go forward because Petitioners failed to pay their employees the contract wages and make the required fringe benefit payments.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 23, 1994

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER CORPORATION, Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF FOSTER WHEELER CORPORATION

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INTRODUCTION

This brief is submitted in response to respondent's brief in opposition to the petitions of FWC and FWEC for certiorari.[1]

POINT I

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO RESOLVE A CONFLICT IN THE CIRCUITS CONCERNING THE RETROACTIVITY OF AN AGENCY DECISION (NLRB) ENFORCED BY THE CIRCUIT COURT OF APPEALS

After nine years of litigation, it appears that rhetoric has replaced reality in the contentions made by LIUNA as to why this Court should not grant certiorari in this case. Thus, LIUNA focuses upon the alleged "subterfuge" and "deceit" of FWEC in its approach to securing the MOEPSI contract. (Opp. 2, 5, 8) Rather, as discussed more fully in the petition of FWEC, MOEPSI's award of the contract to EPC[2] was widely publicized during the fall and winter of 1984. (App. 11a) In fact, LIUNA filed a grievance concerning the award on April 9, 1985. (App. 13a)

LIUNA's liberal sprinkling of the words "subterfuge" and "deceit" throughout its brief is obviously intended to obfuscate the significant legal issues presented by the petitions of FWC and FWEC. Interestingly, LIUNA makes no mention of the fact that unfair labor practice charges were filed by LIUNA in three separate regions of the National

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[1]The parties to this proceeding shall be identified as follows: Foster Wheeler Corporation (FWC); Foster Wheeler Energy Corporation (FWEC); Laborers International Union of North America (LIUNA).

[2]Energy Plant Constructors.

Labor Relations Board. Each charge was dismissed on the ground that LIUNA had not achieved majority status at the worksite, as was necessary to convert the section 8(f) prehire agreement into a section 9(a) collective bargaining agreement. (App. 15a) Each of the Regional Directors was obviously unimpressed by LIUNA's claims that the law as it then existed should somehow bend to LIUNA's allegations of "deceit" and "subterfuge". In fact, LIUNA's allegations of deceit and subterfuge are completely irrelevant. Under the law as it previously existed, courts never examined the good faith of the parties in their contractual relationship, but sought to determine simply whether repudiation was effectively communicated by act or deed. As indicated above, the court below has found that the award of the MOEPSI contract to EPC was widely publicized during the fall and winter of 1984. By this and other acts, including several written communications, there can be no question that FWEC fulfilled every legal requirement for repudiation under the law as it existed prior to *Deklewa*.[3] Now LIUNA contends that certiorari should not be granted because of these "unique facts" and because the issue presented as to the retroactivity of *Deklewa* will probably never recur. (Opp. 10) In support of that contention it cites this Court's opinion

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[3]Under pre-*Deklewa* law, a prehire agreement could be repudiated at least four different ways. First, by conduct which is open and notorious. *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Harkins Construction and Equipment Company, Inc.*, 733 F.2d 1321, 1325 (8th Cir. 1984). Secondly, repudiation may be communicated orally. *Ironworkers 103 v. Higdon Construction Company, Inc.*, supra. Thirdly, repudiation may be effectively communicated in writing. *Mesa Verde Construction Company v. Northern California District Council of Laborers*, 598 F.Supp. 1092 (N.D.Cal. 1984). Finally, the employer may repudiate a contract by a petition for an election. *Albuquerque Installation Contractor, Inc.*, 256 NLRB 61 (1981). The record is replete with incidents which would satisfy the foregoing requirements.

in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). While it is true that in *Sioux City* a divided Supreme Court dismissed a writ of certiorari which it had previously granted on the ground that the issue presented was of isolated significance, the Court went on to state:

> "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, **and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal**. *Lane & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)." (Emphasis added.)

This case clearly falls within those in which there is a "real and embarrassing" conflict of opinion and authority between the circuit courts of appeal. Further, inextricably intertwined with that issue is the broader question of the standard to be applied in the review of judicial decisions based upon new rules announced in agency determinations. We shall discuss that issue in the next point of this reply brief.

In our petition we pointed out that the Third Circuit stands alone as **the only circuit** which has applied *Deklewa* retroactively to achieve a result which would not have been possible under pre-*Deklewa* law as reflected in *R. J. Smith Construction Company, Inc.*, 191 NLRB 693 (1971) and its progeny. (Pet. p. 13) In contrast, the Fifth, First and Ninth Circuits have refused to apply *Deklewa* retroactively where the union had not achieved majority status prior to repudiation. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd.*

of Carpenters v. Mar-len of Louisiana, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[4] Indeed, we pointed out that in *International Association of Bridge, Structural & Ornamental Ironworkers v. NLRB*, 843 F.2d 770 (3d Cir. 1988), in which the Third Circuit applied *Deklewa* retroactively, it pointed out that even under the old *R. J. Smith* rule it appeared entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the union. (843 F.2d at 781) LIUNA contends, however, that each of these cases was decided on its own facts, suggesting that the lack of the union's majority status did not play a dominant role in the court's decision. Such is clearly not the case. (Opp. 12) For example, in *CEK Industrial Mechanical Contractors*, supra, at 358, the court said:

> "In those cases in which the rule was applied retroactively, there was evidence that the union had nearly or actually achieved majority status through the conversion doctrine. See *Bufco Corp.*, 899 F.2d at 612; *W. L. Miller*, 871 F.2d at 749; *Ironworkers (Deklewa)*, 843 F.2d at 781. These courts reasoned that there would be no manifest injustice in applying

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[4]Five district courts (in addition to the district court in this case) have reached the same conclusion. *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D. Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. VanderVeen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989), *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

Deklewa because even under the old rule the employer had acted its own risk in repudiating the agreement."

LIUNA further contends that even under pre-*Deklewa* law Foster Wheeler's repudiation of the agreement would have been ineffective under the so-called "doctrine of prevention". (Opp. 11, n. 9) The theory espoused by LIUNA is that had FWEC applied its agreement to the MOEPSI project, the union would have supplied laborers from its Local 70 hiring hall and thus would have achieved majority status. The Third Circuit declined to pass upon this contention, but noted that it is "...far from clear that equitable principles apply to the 'manifest injustice' choice of law inquiry." (App. 43a) In more basic terms, is it not somewhat audacious of LIUNA to make this argument in light of the finding by the district court (undisturbed by the Third Circuit), that at the time of the MOEPSI project and throughout the litigation of this case LIUNA was operating a local hiring hall through its appointed trustee, which illegally discriminated against non-union members in violation of both federal and state law? (App. 66a) See Labor Management Relations Act, §158(a)(3), (b)(2); Alabama Code Section 25-7-30.

This case, therefore, is of importance, first, because it involves a distinct split among the circuits and, secondly, because the success of LIUNA in arbitration would compel the employer to pay very significant monetary damages to LIUNA for not utilizing a hiring hall found to be in violation of both federal and state law. Presumably, the union would then be free to distribute the proceeds of those damages in the same discriminatory manner in which it operated its hiring hall. Certainly, the Court should not countenance such a result, and relief through the process of certiorari should be granted.

POINT II

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE PROPER STANDARD FOR REVIEW OF NEW RULES ANNOUNCED IN ADMINISTRATIVE ADJUDICATIONS WHEN THE ISSUE ARISES IN A PURELY JUDICIAL SETTING

The confusion which surrounds the standard to be applied in determining the retroactivity of administrative adjudications, when the issue arises in a judicial setting, is best exemplified by the position of the parties in this case and the diversity of the circuit courts of appeal which have considered the retroactivity of *Deklewa*. In this case LIUNA, while accepting the rationale of the Third Circuit in this case, clings tenaciously to the position that this Court's decisions in *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), dictate the retroactive application of the Third Circuit's decision in *Ironworkers Local No. 3*, supra, not the Board's decision in *Deklewa*.

(Opp. 16) Petitioners agree with the district court, which held that since this case involves a judicial adjudication, retroactivity is governed by the standards set forth in *Chevron v. Huson*, 404 U.S. 97 (1971), rather than *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). (App. 259a) The Third Circuit reversed the district court, finding that it erred when it departed from *Chenery*'s "manifest injustice" analysis which it deemed appropriate for "agency adjudications" and instead applied the *Chevron* analysis. (App. 3a, 34a) However, the court below went on to apply a five-factor test announced in *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), despite the fact that the D. C. Circuit has acknowledged that it has applied a variety of tests to determine the retroactive

application of administrative decisions. *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C.Cir. 1993); *United Food Workers International Union v. NLRB*, 1 F.3d 24 (D.C.Cir. 1993).

In *Ironworkers Local 3*, 843 F.2d at 780, the Third Circuit applied *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983), in which the Second Circuit said that deference should be given to NLRB decisions absent some manifest injustice. In applying that standard the Third Circuit commented that its result would be no different if it engaged in an independent analysis under *Chenery* or *Chevron*. (843 F.2d at 780, n. 12.) However, in this case the Third Circuit states that its reference to *Semco* was dicta, suggesting by implication (but without any justification whatsoever) that what the Third Circuit really applied in *Ironworkers Local 3* was *Chenery*. (App. 42a) Finally, the court below acknowledged in its decision that not every court applies the same standard of review in cases such as this. (App. 39a) In that, the Third Circuit is clearly correct. In deciding whether *Deklewa* should be applied retroactively, the Fifth, Seventh and Ninth Circuits have applied the *Chevron* test, as did the district court below. *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611-12 (7th Cir. 1990); *United Bhd. of Carpenters Local Union 953 v. Mar-len of La., Inc.*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 895 F.2d 516, 519 (9th Cir. 1989), cert. denied 498 U.S. 877 (1990). Other circuits have applied the "manifest injustice" test. See *CEK Industrial Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-58 (1st Cir. 1990); *NLRB v. Viola Indus. Elevator Div., Inc.*, 979 F.2d 1384, 1396-97 (10th Cir. 1992). (See other cases cited by FWC in its petition for certiorari, pages 13-14.) Clearly, therefore, this issue cries out for clarification and direction by this Court.

The distinction between *Chevron* and *Chenery* is of vital significance, as pointed out by the Third Circuit:

> "The key discrepancy between the two inquiries is that, whereas *Chevron Oil* focuses on the ***reasonable expectations*** of the ***class of persons*** who will be adversely affected by retrospective application of the newly announced rule of law, *Chenery* concentrates on the ***actual*** reliance on the prior rule by the ***particular*** adversely affected ***party*** before the court. That means that the *Chevron Oil* analysis needs only be done once, in the decision first recognizing the new rule; by contrast, the *Chenery* analysis must be repeated in each case where the rule may be retrospectively applied." (App. 35a)

Petitioner's contention that this case is inappropriate for consideration of the retroactivity of agency decisions because it did not arise from an agency determination, but rather, from a decision of the federal judiciary under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, supports the position of FWC and places LIUNA in lockstep with petitioners and the district court, which expressed exactly that reasoning in applying a *Chevron* analysis. (App. 259a) In any event, it is obvious from the foregoing that a state of confusion reigns in this very critical area of the law. Furthermore, at issue is a question which certainly will reoccur, not only with regard to adjudications of the National Labor Relations Board, but with regard to myriad other agencies of the federal government. Accordingly, we urge the court to grant certiorari as to this vital and timely issue.

POINT III

CERTIORARI SHOULD BE GRANTED AS TO THE CIRCUIT COURT'S REFERRAL OF THE ISSUES OF BREACH AND DAMAGES TO ARBITRATION

The petitions of FWC and FWEC contend that the Third Circuit erred in referring the issues of breach and damages to arbitration, in view of the undisturbed finding of the district court that LIUNA, through its Local 70 and designated trustee, operated a hiring hall which discriminated against non-members in violation of both state and federal law. Respondent's brief in opposition devotes only one paragraph to this important issue, stating simply that Judge Becker's "straightforward treatment of this diversionary issue is more than satisfactory and raises no issue worthy of certiorari". (Opp. 17) It also comments that no complaint or NLRB charge had ever been filed with regard to the illegal hiring hall maintained by Local 70. Isn't it interesting that LIUNA chooses to ignore the decisions of the three Regional Directors which dismissed LIUNA's charges attacking the repudiation of FWEC's contract with LIUNA, but now points to the absence of a complaint or NLRB charge as defeating petitioner's request for relief. The simple answer is that no complaint or NLRB charge was filed because the illegality of the hiring hall was not discovered until the trial of this case before the district court, long after the project had been completed. Furthermore, LIUNA makes no mention of the fact that the agreement between LIUNA and FWC specifically provided that FWEC would be obligated to use the local hiring hall only if it were operated lawfully. (App. 304a)

As contended in our original petition, the issues of breach and damages are clearly moot and should not have

been referred to arbitration. Therefore, this Court should grant certiorari as to this issue to preserve longstanding principles of labor law relating to the operation of hiring halls and to prevent LIUNA and its members from unjustly profiting from their own misconduct.

CONCLUSION

Based upon the foregoing and the record as a whole, the Court is urged to grant FWC's petition for a writ of certiorari as to all issues presented.

Respectfully submitted,

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